92-805

No.

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TIMOTHY A. DeWITT, ET AL.,
APPELLANTS

v.

THOMAS S. FOLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

ARLO HALE SMITH
251 Kearny St., Ste. 602
San Francisco, Calif. 94108
(415) 788-5297
Counsel of Record

TIMOTHY A. DeWITT
6603 Kensington Ave.
Richmond, Calif. 94805
(510) 237-7240

QUESTIONS PRESENTED

In this case officers of the state and federal governments attempt to compel the sovereign people of California to select their federal congressional delegation through a racially segregative districting plan formulated by unelected members of the California Supreme Court. The questions presented by this case are:

1. Whether the federal government has power substantively to apportion federal Representatives within, as opposed to among, the sovereign States.

2. Whether the California Supreme Court is "the Legislature" of California within the meaning of the Elections Clause of the U.S. Constitution (art. I, sec. 4).

3. Whether the Fourteenth Amendment's prohibition against "separate but equal" laws which has been applied, among other things, to public schools, beaches, and golf courses, also applies to congressional election districts.

4. Whether requiring federal voters to vote in district contests in which as many as six to seven times (600% to 700%) as many voters vote in some suburban and rural districts compared to other, urban districts violates the constitutional requirement of "one person, one vote."

5. Whether congressional voters and candidates qualified directly in and by the federal Constitution (Art. I, sec. 2, cls. 1 & 2) may be permitted, or required, by federal law (2 U.S.C. 2c) simultaneously to participate in contests

selecting fully 100% of the congressional delegations in, for example, the small States of Alaska and Wyoming, but less than 2% of the delegation for the sovereign, large State of California.

6. Whether federal Congress may mandate that State legislatures and the sovereign people of the States (or state and federal courts) affirmatively draw or establish congressional districts.

7. Whether Framers considered intra-state territorial residency restrictions to be "fundamental" to the American political system, and even assuming they did, whether their failure to express or incorporate this belief in the new, written Constitution demonstrates that they intended such restrictions to be subject to ordinary Constitutional review.

8. Whether minority voting groups of all types (e.g., racial minority groups, or the minority Republican political party) must have the opportunity to elect Members of the U.S. House of Representatives in numbers proportionate to their actual voting strength in the sovereign States.

PARTIES TO THE PROCEEDINGS

The appellants here, who were plaintiffs in the district court, are Timothy A. DeWitt, Pamela R. DeWitt-Carter, Dorothy S. Baldwin, residents and qualified federal voters of the State of California, and Rene A. Rivas, a resident and qualified federal voter from the Commonwealth of Virginia.

The appellees in this Court, defendants below, are Thomas S. Foley, Speaker of the United States House of Representatives; Pete Wilson, Governor of the State of California; and March Fong Eu, Secretary of State of the State of California.

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (App. A, infra), is not yet reported.

JURISDICTION

The judgment of the three-judge district court (App. A, infra) was filed on August 31, 1992. The notice of direct

appeal (App. B, infra) was filed on September 11, 1992. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Voter Qualifications Clause, art. I, § 2, cl. 1; Candidate Qualifications Clause, art. I, § 2, cl. 2; Apportionment Clause, art. I, § 2, cl. 3; Elections Clause, art. I, § 4; Guarantee Clause, art. IV, § 4; Speech Clause of the First Amendment, amend. I; Tenth Amendment, amend. X; Equal Protection Clause of the Fourteenth Amendment, amend. XIV, § 1; Due Process Clause of the Fourteenth Amendment, amend. XIV, § 1; Fifteenth Amendment, amend. XV, § 1; Nineteenth Amendment, amend. XIX, § 1; and Twenty-sixth Amendment, amend. XXVI, § 1, of the

United States Constitution; and the federal Voting Rights Act, 42 U.S.C. 1971, et seq.; 2 U.S.C. 2c (1967); Art. XXI, § 1 of the California Constitution; Sec. 100(a) of the California Elections Code; and Sec. 25000(a) of the California Elections Code, are reproduced at App. C, infra.

STATEMENT

A. THE CALIFORNIA SUPREME COURT IS NOT 'THE LEGISLATURE' OF CALIFORNIA WITHIN THE MEANING OF THE ELECTIONS CLAUSE OF THE UNITED STATES CONSTITUTION

The Elections Clause of the United States Constitution, art. I, sec. 4, provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature...." (Emphasis supplied.) In the case of

Smiley v. Holm, 285 U.S. 355 (1932), this Court considered a dispute involving the question, in view of this requirement, of whether the popularly elected Governor of a State could participate in the State's congressional redistricting process. The Governor of Minnesota had vetoed a redistricting plan supported and proposed by the state legislature. State elections officials nonetheless attempted actually to implement the legislature's plan. The dispute eventually reached this Court. Construing the words "the Legislature" broadly to mean the ordinary legislative or law-making process in the State, the Court concluded, per Chief Justice Hughes, that the popularly elected Governor of the State was an integral part of the ordinary legislative or law-making process in the State and

could therefore legitimately participate in the formulation of new congressional districting plans. In the end, statewide or at-large elections were eventually ordered for Minnesota's congressional elections that year.[1]

This Court's reasoning in Smiley v. Holm applies directly to the facts of the instant case. The California State Legislature presented a new congressional districting plan to the Governor for his approval. On September 23, 1991, the Governor vetoed the plan and, on the same day, the legislature failed to override

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[1] Cf. Brown v. Saunders, 159 Va. 240, 166 S.E. 105 (1932) (at-large elections also ordered) with Baker v. Carr, 369 U.S. 186 (1962) (federal malapportionment disputes justiciable in Art. III courts), and subsequently Assembly v. Deukmejian, 30 Cal.3d 638, 180 Cal. Rptr. 297 (1982) (per Bird, C.J.) (redistricting plan explicitly rejected by the people of the State through direct referendum nonetheless ordered enforced by state high court under purported authority of federal 2 U.S.C. 2c (1967)).

the Governor's veto. Later, the Governor, in both his official and personal capacities, pursued an original action against the Secretary of State, the State's chief elections officer, before the California Supreme Court -- all in a transparent bid to cut the popularly elected state legislature out of the redistricting process altogether and to have unelected members of the state high court eventually formulate a new plan in their stead. See Wilson v. Eu, 54 Cal.3d 471, 286 Cal. Rptr. 280, 816 P.2d 1306 (Sept. 25, 1991). Finally, on January 27, 1992, the California Supreme Court obliged and announced its own congressional redistricting plan. See Wilson v. Eu, 1 Cal.4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992).

Following this Court's reasoning in

Smiley v. Holm, however, the words "the Legislature" in the Elections Clause of the U.S. Constitution simply cannot be construed so broadly as to include the California Supreme Court. If the popularly elected legislators of the State, and Congress, decline for whatever reason to exercise their exclusive authority under the Elections Clause to draw new congressional districts for California, the unavoidable federal Constitutional result is plain: there shall be no new districts. The state Supreme Court is demonstrably not, like the Governor in Smiley, part of the ordinary legislative or law-making process in California, and therefore simply cannot be said to be part of "the Legislature" of California within the meaning of the Elections Clause.

Defendant-Appellees Foley, Wilson and Fong Eu lack authority to hold or conduct California's congressional elections according to the districting plan formulated and proposed by the California Supreme Court.

B. GOVERNMENT OF THE UNITED STATES MAY NOT MANDATE THAT GOVERNMENT OF THE STATE OF CALIFORNIA, OR PEOPLE OF CALIFORNIA, DRAW OR ESTABLISH SINGLE-MEMBER CONGRESSIONAL ELECTION DISTRICTS

In the case of New York v. United States, 112 S. Ct. 2408 (June 19, 1992), this Court reviewed and invalidated a federal "take title" provision mandating in effect that sovereign States take certain specified actions or become titleholder to unwanted nuclear waste materials. In refusing effect to this provision, the Court re-affirmed that:

> States are not mere political subdivisions of the United

> States. State governments are neither regional offices nor administrative agencies of the Federal Government.
>
> In providing for a stronger central government,... the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.

112 S. Ct., at 2423, 2434. In the instant action, Appellants challenge 2 U.S.C. 2c (the federal single-member districting statute) on the basis that it mandates that the States perform the affirmative political or legislative act of drawing or establishing single-member districts. Appellants argue that this mandate violates the plain terms of both the Elections Clause and the Tenth Amendment -- as well as States' rights to independent, republican governments under

the Guarantee Clause.[2]

This precise question appears to have been finally resolved by the House of Representatives' own actions -- exactly consistent with this Court's analysis in New York v. United States, supra -- in the year 1844.

In the congressional elections immediately following passage of Congress' first federal districting statute (see 5 Stat. 491 (1842)), four states -- New Hampshire, Georgia, Mississippi, and Missouri -- nonetheless again elected statewide/at-large delegations to represent them in Congress. The Committee on Elections was tasked to study the question and report

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[2] For Appellants' federalism argument under the Guarantee Clause, see generally Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1 (1988).

back to the whole committee of the House.

On January 22, 1844, the Committee majority, per Stephen A. Douglas (D-Ill.), Committee Chairman, concluded that the four statewide delegations must be recognized and seated as bona fide members of Congress. The Committee reasoned that the federal government simply lacked power under the Elections Clause, or any other Constitutional provision, in effect to instruct or order the sovereign States actually to draw or establish the required districts:

> The right to change State laws or to enact others which shall suspend them, does not imply the right to compel the State Legislatures to make such changes or new enactments. (Specifically construing the Elections Clause.)
>
> The constitution contains no grant of power to Congress to superintend and control and direct the legislation of the States.

> The great radical evil in the articles of confederation, was the constant collisions between the Federal and State Governments, produced by the laws of the former operating upon the latter in their corporate and sovereign capacities, instead of binding the people individually.

Relative to the Right of Members to Their Seats in the House of Representatives, H.R. No. 60, 28th Cong., 1st Sess. (1844), at pp. 6-7.

In the instant case, the California State Legislature and Governor, functioning collectively as "the Legislature" of California directly under the Elections Clause of the U.S. Constitution (art. I, sec. 4) -- after failing to identify any set of congressional districts they could support -- decided not to establish the required new election districts.

Like "the Legislatures" from New

Hampshire, Georgia, Mississippi, and Missouri almost 150 years earlier, they declined to follow the federal mandate in 2 U.S.C. 2c (1967) (virtually identical in wording and effect to 5 Stat. 491 (1842)) that they draw and establish new single-member districts. Nonetheless, and in literally complete disregard of the plain terms of the Elections Clause (both independently and as construed by this Court in Smiley v. Holm, 285 U.S. 355 (1932)), on January 27, 1992, the California Supreme Court itself formulated and proposed new congressional districts for California. See Wilson v. Eu, 1 Cal.4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992). In effect, then, at the behest only of the person of the Governor, and additionally with subsequent voluntary compliance from only

the person of the Secretary of State, the California Supreme Court stepped in falsely to enforce a federal districting mandate which has been understood for almost 150 years -- and by the U.S. House of Representatives itself -- to be constitutionally void and therefore simply unenforceable.

The Government of the United States may not instruct, order, mandate, or in any other way require the sovereign people and State of California to take the affirmative political action of establishing or drawing new congressional election districts. Defendant-Appellee state and federal governmental officers and administrators Foley, Wilson, and Fong Eu therefore simply lack power to hold or conduct California's congressional elections through (or apply

territorial residency restrictions to) the districting plan falsely formulated and proposed by the California Supreme Court on January 27, 1992.

C. FEDERAL AND STATE GOVERNMENTS LACK POWER TO APPORTION FEDERAL REPRESENTATIVES WITHIN, AS OPPOSED TO AMONG, THE SOVEREIGN STATES OR TO IMPOSE ADDITIONAL SUB-STATE TERRITORIAL RESIDENCY RESTRICTIONS ON VOTERS AND CANDIDATES ALREADY QUALIFIED DIRECTLY IN AND BY THE U.S. CONSTITUTION

1. Voter and Candidate Qualifications Clauses of the United States Constitution Bar Additional Sub- or Intra-state Voter and Candidate Territorial Residency Restrictions.

The Voter and Candidate Qualifications Clauses of the U.S. Constitution, Article I, § 2, cls. 1 & 2, directly establish the qualifications of voters and candidates in elections for the U.S. House of Representatives. The voter clause imposes one qualification:

voters "shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Art. I, § 2, cl. 1. The candidate clause, for its part, imposes three qualifications: candidates "[must] [1] have attained to the age of twenty five years, [2] have been seven years a citizen of the United States, and ..., [3] when elected, be an inhabitant of the state in which [they] shall be chosen." Art. I, § 2, cl. 2.

James Madison and Alexander Hamilton explained in separate contributions to the Federalist Papers the rationale for directly controlling the qualifications of federal voters and candidates in the new Constitution. In Federalist No. 52, James Madison wrote that:

> The first view to be taken of [the House of Representatives]

> relates to the qualifications of the electors and the elected. Those of the former are to be the same with those of the electors of the most numerous branch of the State legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. ... The qualifications of the elected...have [also] been very properly considered and regulated by the convention.

Federalist Papers, No. 52 (I. Kramnick ed., 1987), p. 323. See also 2 J. Story, Commentaries on the Constitution of the United States § 626, at 101-102 (1970 ed.). In Federalist No. 60, Alexander Hamilton responded to anti-federalist criticism that the proposed Elections Clause (Art. I, § 4) would give too much power over congressional elections to the federal government. Hamilton replied that:

> Its [the federal government's] authority would be expressly

> restricted to the times, the places, and the manner of elections. The qualifications of the persons who may choose [voters] or be chosen [candidates], as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

Federalist Papers, No. 60 (I. Kramnick ed., 1987), p. 360 (emphasis in original). The plain meaning of both the Voter and Candidate Qualifications Clauses -- as supported by contemporaneous written accounts of two of the leading architects of the federal Constitution -- then, is that the entire subject of the qualifications of federal voters and candidates is directly controlled and occupied by the U.S. Constitution itself.

Following the Framers' lead, the courts and Congress have always adopted the same clear view of the qualifications

clauses. In Ex parte Yarbrough, 110 U.S. 651 (1884), for example, this Court held that:

> The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state.

110 U.S. at 663. And, sixteen years later, the Court explicitly re-affirmed this view in the case of Wiley v. Sinkler, 179 U.S. 58, 63-64 (1900), quoting in full its own prior statement on the subject. In 1911, the Fifth Circuit made clear in the case of Felix v. United States, 186 F. 685 (5th Cir.

1911), that the purpose of the Voter Qualifications Clause was simply to identify all those persons statewide who are qualified to participate in a State's federal congressional elections:

> The states were left free to prescribe the qualifications of voters for the most numerous branch of their own Legislatures. When they have done so, such voters are made by the Constitution qualified electors to vote for members of the House of Representatives. They have no authority to directly prescribe such qualifications. They provide who shall vote for the popular branch of their legislatures, and the Constitution confers on such electors the right to vote for members of the House of Representatives of the United States.

Id. at 689. In the more modern case of Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), this Court again followed the Framers' plain view of the qualifications clauses. In

Tashjian, the Court faced a rule of Connecticut's Republican party having the effect of expanding the set of voters participating in its congressional primary elections over that permitted to vote in its state primary elections. The Court majority concluded that the party rule did not violate the Voter Qualifications Clause precisely "because it [did] not disenfranchise any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature." 479 U.S. at 229 (emphasis supplied).

Notably, two Justices took an even stricter view of the clause in dissent. Justice Stevens, with Justice Scalia joining, would have held that the clause prohibited even the effect, resulting

from the internal nominating rules of a private political party, of relaxing the qualifications of voters in federal, as opposed to state, primary elections. 479 U.S. at 230-37.

This Court, then, has consistently ruled, from Ex Parte Yarbrough in 1884 through Tashjian as recently as 1986, that the Voter Qualifications Clause itself controls the subject of the qualifications of federal voters and that no additional qualifications may be imposed by the States or Congress.

The courts' approach to the Candidate Qualifications Clause has been no less clear. In the leading case of Powell v. McCormack, 395 U.S. 486 (1969), for example, this Court considered an attempt by the U.S. House of Representatives in effect to expel

Representative Adam Clayton Powell (D-N.Y.) for alleged ethics violations by simple majority vote. After an exhaustive review of the history and meaning of the Candidate Qualifications Clause (including the writings of Framers Madison and Hamilton discussed above), the Court concluded that the House of Representatives had no power in effect to disqualify Representative Powell from his seat in the House precisely because he in fact met all of the maximum (1) age, (2) length-of-citizenship, and (3) state-residency requirements imposed by the Candidate Qualifications Clause.[3]

The plain meaning of the text of the qualifications clauses themselves, the

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[3] See also State ex rel. Johnson v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948) (collecting qualifications clause authority as of that date in invalidating state restriction against sitting Governor running for Congress).

contemporaneous writings of leading Framers, and repeated statements by this Court across two centuries (and in modern times), all make clear that the Voter and Candidate Qualifications Clauses of the U.S. Constitution occupy the entire subject of the qualifications of federal voters and candidates, respectively, and that the States and Congress therefore simply lack power to impose additional qualifications on either subject.

a. District residency restrictions impose impermissible additional 'qualifications' on all Constitution-qualified federal voters and candidates within the sovereign States.

In congressional election of 1806, William McCreery of Maryland won election to one of the two seats available in a two-member district around the City of Baltimore. Questions subsequently arose, however, whether Mr. McCreery satisfied

Maryland's state-law requirement that he live in a particular section of that district to be elected. Eventually the dispute was presented to the House of Representatives in the form of a contested election case. After considerable deliberation, the House of Representatives finally recognized and seated Mr. McCreery as a Representative from Maryland. In the process, the House specifically disregarded Maryland's own territorial residency requirement on the grounds that it constituted an impermissible additional qualification violative of the Candidate Qualifications Clause. See 1 A. Hinds, Precedents of the House of Representatives § 414, at 381; 17 Ann. of Cong. 1237 (1807); M. Clark, Cases of Contested Elections in Congress, from the Year 1789 to 1834,

Inclusive (1834). And this early precedent of the House of Representatives was specifically approved by this Court in the leading qualifications clause case of Powell v. McCormack, supra.

Notably, this early precedent of the House of Representatives also held strong influence in the debate, nearly 35 years later, over Congress' first attempt to impose a federal single-member districting requirement. See 5 Stat. 491 (1842). Senator Bagby of Alabama, for example, made the following similar argument related specifically to the Voter Qualifications Clause:

> I assert, upon the authority of the Federal Constitution, that each voter, in each of the states of this Union, having the requisite qualifications to vote for members of the most numerous branch of the State Legislature, has a right to vote for the whole number of Representatives to which such

> state, according to numbers, is entitled.

Congressional Globe, 27th Cong., 2d Sess., at 583 (App. 1842). And Representative Payne, also of Alabama, made the following almost identical argument relating to the Candidate Qualifications Clause:

> But, we are told by gentlemen that it is not contemplated to confine the Representative to a particular district. I ask, if the practical operation of the system would not confine him to the district of which he would be the Representative -- at least as far as he would be known or recognized upon this floor? If so, you would indirectly add a qualification to the Representatives in Congress, which, many of you admit you could not do directly. Now, I deny that Congress has the power to do indirectly that which cannot be done directly.

Congressional Globe, 27th Cong., 2d

Sess., at 361 (App. 1842).[4] Two years later, these attacks against the constitutionality of 5 Stat. 491 (1842) were in effect fully adopted by the House of Representatives. In the elections immediately following passage of the new federal districting law, four states -- New Hampshire, Georgia, Mississippi, and Missouri -- ignored the new districting

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[4] And Representative Payne's concern has indeed been borne out by subsequent American history. See J. Bryce, The American Commonwealth 487 (1913) ("Nothing more contributes to make reform difficult than the inveterate habit of choosing residents only as members."); L. Schmeckebier, Congressional Apportionment, Studies in Administration No. 40, Brookings Institution (1941), p. 140 ("Occasionally a representative is not a resident of the district he represents, but such instances are few and far between."); "Congress of the United States," The Software Toolworks Illustrated Encyclopedia, Grolier Electronic Publishing, Inc. (1990) ("Although members of the House are required only to be inhabitants of their states, and not necessarily inhabitants of the districts from which they are elected, in fact local residency has become an unwritten, or customary, requirement for success at the polls.").

law and again sent delegations elected statewide to represent them in the House. In response, the House finally concluded that it had no choice but to recognize and seat the statewide delegations precisely on the grounds that Congress' new districting law was indeed unconstitutional.[5]

Senator Bagby and Rep. Payne's arguments gained additional support from the courts almost 120 years later. In the cases of Hellmann v. Collier, 217 Md. 93, 141 A.2d 908 (1958); Exon v. Tiemann, 279 F. Supp. 609 (D. Neb. 1968); and State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968), courts faced identical efforts by the States of

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[5] See Relative to the Right of Members to Their Seats in the House of Representatives, H.R. No. 60, 28th Cong., 1st Sess. (Jan. 22, 1844) (per Stephen A. Douglas (D-Ill.), Chair, Committee on Elections).

Maryland (again), Nebraska, and New Mexico, respectively, to require candidates for congressional office personally to live in the districts they sought to represent. Each of the single-member district residency requirements in question were invalidated by the courts as impermissible additional "qualifications" barred directly by the Candidate Qualifications Clause.

In Federalist No. 52, James Madison articulated a additional, special reason for fixing voting qualifications in the new Constitution:

> To have submitted [the definition of the right of suffrage] to the legislative discretion of the state would have been improper [because suffrage is a fundamental article of republican government]..., and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal

> government [U.S. House of Representatives] which ought to be dependent on the people alone.

Federalist Papers, No. 52 (I. Kramnick ed., 1987), p. 323 (emphasis supplied). The Voter Qualifications Clause thus has the basic structural purpose of protecting the people of the States against the substantive encroachment of their own state governments into the process of selecting the States' federal congressional delegations.

District residency restrictions, however, have a massive substantive effect on the selection of state congressional delegations. Local ideas and interests are vaulted over competing, cross-district, statewide ideas and interests. (Itself contributing in great part to the fiscally draining phenorenon of "pork-barrel" spending in Congress.)

Minor and minority non-geographical voting coalitions of all types (including young voters, women, and racial minorities) are virtually blocked from obtaining any, let alone proportional, representation in Congress. Incumbents are protected from ever having to compete against each other for re-election. Incumbents are then free simply to fend off beleaguered challengers (and their supporters) within their own small districts. And the phenomenon of partisan political "gerrymandering," an intractable problem that has vexed, among many others, this Court,* is itself made possible only through the existence of voter and candidate district residency restrictions. And the list goes on and

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* See Davis v. Bandemer, 478 U.S. 109 (1986).

on.

In sum, for at least 185 years in America it has been bedrock constitutional doctrine that intra-state district residency restrictions impose impermissible additional "qualifications" on congressional candidates protected by the Candidate Qualifications Clause of the United States Constitution. The same basic understanding simply must also apply to voter residency restrictions under the exactly parallel Voter Qualifications Clause. In addition, as recognized by Members of Congress as early as 1842 (and specifically alleged in this case below), voter residency restrictions themselves also impose virtually insurmountable, de facto restrictions on, again, all candidates.

The district residency restrictions imposed by 2 U.S.C. 2c and sec. 100(a) of the California Elections Code violate Appellants' fundamental federal political rights protected in each of the paramount Voter and Candidate Qualifications Clauses of the United States Constitution.

2. Under Plain Meaning and Structure of the Voter and Candidate Qualifications, Apportionment, and Elections Clauses of the U.S. Constitution, Federal and State Governments Simply Lack Power Substantively to Apportion Representatives WITHIN, as opposed to AMONG, the Sovereign States.

The Apportionment Clause of the U.S. Constitution, both originally and as restated in the Fourteenth Amendment (U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2), provides simply that Representatives "shall" be apportioned

"among" the States. As made clear by Congress' use of the "Apportionment Bill" when it first attempted to mandate single-member districts, however, both Congress (through 2 U.S.C. 2c) and the State of California (through Cal. Const. art. XXI, § 1 and § 100(a) of the elections code) now attempt illegitimately to apportion seats, and thus Representatives, within, as opposed to among, the States.[7]

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[7] And apportioning Representatives within, as opposed to among, the States has a strong substantive impact on the electoral rights of all qualified federal voters. As specifically alleged by Appellants in their complaint in this action, sub-state apportionment transfers electoral power (1) from the class of all qualified and actual voters to all non-voters, (2) from the voters of large States to the voters of small States (and this was precisely by the design of small-State members of the U.S. Senate in 1842), and (3) from actual voters in contests with high voter turnout to actual voters in districts with low vote totals. The effect is devastating specifically on the Californian Appellants here who are all (1) actual voters, (2) from a large State (California), and (3) a

The Elections Clause of the United States Constitution, for its part, simply does not encompass (bears no relation to) the substantive function of apportionment. As Chief Justice Hughes emphasized in Smiley v. Holm, 285 U.S. 355 (1932), this clause authorizes only those regulations "as to procedure" that are "necessary" actually to administer elections and to protect "the fundamental right involved." 285 U.S. at 366. Apportionment, by contrast, involves the substantive allocation of seats, before the election itself, to pre-determined groups of people or voters. Neither the Apportionment nor the Elections Clauses authorizes the substantive apportionment of seats and Representatives within, as

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district with a comparatively high rate of voter participation.

opposed to among, the States.[8]

In any case, however, the Voter Qualifications Clause of the U.S. Constitution (art. I, § 2, cl. 1) itself independently specifies exactly how Representatives are to be selected, and thus seats allocated, within the States: "The House of Representatives shall be composed of Members chosen every second year by the people of the several states [by qualified voters, in elections]...."

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[8] If supporters of district residency restrictions now want to authorize the federal government to apportion Representatives within, as opposed to among, the sovereign States, however, they must first amend the Constitution's plain, structural provisions already affirmatively prohibiting such a practice. Cf. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (invalidating direct tax as violative of the exactly parallel taxation prong of the Apportionment Clause in period before ratification of the 16th Amendment). Note, however, that repeated efforts in our history to amend the Constitution to require single-member districting have all failed. See Remarks of Sen. Graham, Cong. Globe, 27th Cong., 2d Sess., at 748-49 (App. 1842).

While Representatives are "apportioned" among the States, then, they are to be "chosen" by qualified voters (in competitive, including geographically competitive, elections) within the States. Any attempt to pre-determine who will end up getting exactly what representation before an election even occurs, however, simply undermines the very idea of open, free, and competitive elections.

The apportionment of seats within, as opposed to among, the State is not only not authorized in the Apportionment or Elections Clauses, it violates the very notion of free and competitive elections mandated in the Voter Qualifications Clause.

3. Fundamental Principle of Majority Rule, or Popular Consent, Protects Rights of All Political and Other Minority Voting Groups to

Elect Representatives in Numbers Proportionate to Their Actual Voting Strength.

The Guarantee Clause of the U.S. Constitution (art. IV, sec. 4) provides in part that "[t]he United States shall guarantee to every State in this Union a Republican form of Government." The Framers understood the "republican form of government" to be a modified form of pure democracy in which, instead of meeting in person to enact laws for the state, the people would elect representative assemblies or legislatures in effect to govern on their behalf. Leading Framers were keenly aware of the paramount importance of the processes by which these new representative assemblies would be selected. John Adams, for example, wrote in April 1776 that:

The principal difficulty lies,

> and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interests in the people should have equal interests in it. Great care should be taken to effect this and to prevent unfair, partial, and corrupt elections.

J. Adams, Thoughts on Government (1776), excerpted in The Founders' Constitution: Major Themes at 108 (P. Kurland & R. Lerner eds.) (1987). Adams' emphasis on what he termed "equal representation" stemmed from the understanding that representative assemblies existed simply to simulate what the people would do if they could meet and govern in person. The core rationale behind pure democracy -- majority rule or popular consent --

was to be left fully intact in the new, republican governments.

The district residency restrictions at issue in this case violate the U.S. Constitution's guarantee of republican government. They create artificial, winner-take-all contests across the State in which local majorities (51% segment) are permitted to select all (100%) of the representation available in each district. In the process, John Adams' goal of "equal representation" -- producing in the legislature the desired "exact portrait" of the people -- becomes unobtainable. Major and majority ideas and interests of all kinds are systematically over-represented in the legislature. As a result, the very idea of "majority rule" or "popular consent" generally is itself irretrievably denied.

Mere majorities (in the legislature) of majorities (in the elections) (26% segments) of the people at large become empowered to enact legislation governing all (100%) of the people.

In sum, the judicially discoverable and manageable standard of "majority rule" or "popular consent" makes clear that the district residency restrictions at issue in this case violate the U.S. Constitution's fundamental guarantee of republican government. As specifically anticipated by John Adams as early as April 1776, in the republican form of democracy, election laws must not in any way impair or impede the ability of minority voting segments to obtain "equal," or proportional, representation in multi-member representative or legislative bodies.

D. DISTRICT COURT APPLIED WRONG STANDARD OF REVIEW IN SUMMARILY DISMISSING APPELLANTS' NINE SEPARATE CLAIMS FOR RELIEF BASED ON VARIOUS PROVISIONS OF THE FIRST THROUGH TWENTY-SIXTH AMENDMENTS TO THE CONSTITUTION

In dismissing each of Appellants' nine separate claims based on various amendments to the Constitution, the district court applied the following entirely new and unprecedented standard of review:

> District elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference.

Opinion and Judgment of Dismissal, App. A, infra, at p. 35. With this summary new statement, the district court disposed of fully NINE of Appellants' claims based on such otherwise fundamental constitutional provisions as

the Free Speech Clause of the First Amendment; the Tenth Amendment; the Equal Protection and Due Process Clauses of the Fourteenth Amendment; and each of the Fifteenth, Nineteenth, and Twenty-sixth Amendments (specifically protecting the rights of all racial minority, female and young voters). In essence, the district court held through this single sentence that, no matter how powerfully (or even deliberately or intentionally) single-member district residency restrictions (are used to) discriminate against (1) all female voters and candidates (and women are currently 1900% less represented in the U.S. House of Representatives than men); (2) all challenger candidates and their supporters (and incumbents today are often re-elected at rates in excess of 96

to 98%); (3) all minor or minority racial and ethnic voters and candidates (also specifically protected in the federal Voting Rights Act, 42 U.S.C. 1971, et seq.); or (4) members of the minority Republican political party (and the competing majority Democrat party has held an absolute majority of the seats of the U.S. House of Representatives for fully 56 of the last 60 years in America), the courts nonetheless may not review these restrictions against the Bill of Rights, or any other subsequent, written amendments to the Constitution. The district court applied the wrong standard of review in summarily dismissing fully nine of Plaintiff-Appellants' separate claims for relief in this case.

1. District Residency Restrictions Violate Core Political Rights Protected Under Various Written Amendments to the Constitution.

(a) One person, one vote.

In proposing its new districting plan, the California Supreme Court failed even to consider actual voting patterns across the State. The Court in effect treated bare population equality among various districts as a kind of "safe haven" against all claims of unequal electoral influence under the Voter Qualifications and Equal Protection Clauses.

California's new districting plan, however, yields enormous deviations in actual votes cast from district to district, resulting in dramatic inequality in actual electoral influence across the State. In California's June 1992 primary, for example, approximately

six to seven times (600 to 700%) more voters turned out in each of the Republican-leaning Sixth and Tenth Congressional Districts in suburban/rural northern California as compared to the strongly Democrat-leaning Thirty-Third Congressional District located in urban southern California.

The new plan's effect on actual electoral influence across the State is also disturbingly systematic. It appears to skew electoral influence in part (1) toward southern and away from northern California; (2) toward urban areas and away from suburban and rural areas; and (3) toward predominantly partisan Democrat regions and away from Republican-leaning areas.*

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* In California's June 2, 1992, congressional primary election, taken on an aggregate basis, each vote cast in the 17

Given the huge deviations or variances in actual votes cast that exist under the new plan, the district residency restrictions challenged in this case violate the Voter Qualifications and Equal Protection Clauses of the U.S. Constitution. This Court held in Wesberry v. Sanders, 376 U.S. 1 (1964), and Karcher v. Daggett, 462 U.S. 725 (1983), among other cases, that unnecessary deviations in population from district to district violated voters' rights to actual electoral equality. No suggestion was made in those cases, however, that bare population equality alone would serve to insulate a

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districts situated in and around the County of Los Angeles (25th through 41st Congressional Districts) carried approximately 50% more weight than each vote cast in the 17 northernmost districts in the State (First through 17th Districts).

districting plan against electoral equality, or "one person, one vote" challenges. Indeed, the reasoning employed in those cases -- the paramount emphasis placed on actual electoral equality -- itself compels the conclusion that systematic deviations in actual votes cast from district to district also violate all voters' fundamental, constitutionally protected rights to "one person, one vote."[10]

(b) Fundamental rights equal protection.

The district residency restrictions imposed by § 100(a) of the California Elections Code create a classification

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[10] Cf. Judge Kozinski's opinion, concurring and dissenting in part, in Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) (concluding that "electoral equality" rather than "equality of representation" provides underlying rationale of this Court's one-person, one-vote decisions relating to state and local elections), cert. denied, 111 S. Ct. 681 (1991).

between members of geographical voting groups, on the one hand, and all non-geographical voting groups, on the other.

Under California's new plan, various geographical populations across the State are guaranteed proportional electoral results. At the same time, however, all non-geographical populations and voting groups across the State are forced to compete in artificial winner-take-all competitions to obtain even the most minimal representation (let alone exactly proportional representation).

This classification in turn burdens exercise of the fundamental right to vote. Members of minor or minority non-geographical voting groups -- including all racial minority, female, and young voters specifically protected in each of the Fifteenth, Nineteenth, and Twenty-

sixth Amendments -- have a systematically more difficult time electing candidates of their choice in artificial winner-take-all contests. Additionally, artificial residency restrictions block such minority voters from associating together across district boundaries and combining their votes in support of common candidates.[11]

In the case of Dunn v. Blumstein, 405 U.S. 330 (1972), this Court invalidated a durational residency requirement on similar grounds. The Court found that the one-year residency requirement at issue in the case created a classification between newcomer and

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[11] For description of relation between free association, on the one hand, and the ability of minority voting groups to obtain proportional representation in multi-member legislative bodies, on the other, see Sudgen, Free Association and the Theory of Proportional Representation, 78 Am. Pol.Sci. Rev. 31 (1984).

long-term residents and that this classification in turn burdened all newcomers' exercise of the fundamental right to vote. Finding no justification for this burden, the Court invalidated the one-year residency requirement.

The Court's reasoning in Dunn applies with equal force to the classification present here. The States and Congress simply may not -- consistent with the Equal Protection Clause -- simultaneously guarantee proportional electoral results for all minor or minority geographical populations and voting groups and at the same time deny even the opportunity for proportional representation to all minor or minority non-geographical populations and voting

groups.[12]

(c) 'Separate but equal' districts.

The special masters appointed by the California Supreme Court to draw California's new congressional districting plan admitted that literally their first operational objective was to create racially separate and divided election districts. See Wilson v. Eu, 1 Cal.4th 707, 733 (Jan. 27, 1992) (Mosk, J., dissenting, citing special masters'

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[12] See also Rogers v. Lodge, 458 U.S. 613 (1983) (that government maintained an electoral system with knowledge of its discriminatory effect or impact on protected racial minority voters sufficient to establish violation of Fifteenth Amendment).

Note that Appellants' also present a fundamental rights due process claim in this case. Appellants specifically allege in their thirteenth claim for relief that district residency restrictions violate all voters' interests in substantive due process by blocking establishment of a coherent, rational relationship between actual votes cast and seats won in a State's congressional election.

Report, id. at 769-70). California's new districting plan thus plainly violates this Court's ruling in the landmark case of Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny. In Brown, this Court ruled that racially separate and segregative public educational facilities violate affected school children's rights under the Equal Protection Clause of the Fourteenth Amendment. And, in the years since this ruling, the Court has extended its prohibition against "separate but equal" laws, among other things, to public parks, buses, golf courses, beaches, athletic contests, restaurants, auditoriums, and more recently, public colleges and universities.[13]

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[13] United States v. Fordice, 112 S. Ct. 2727 (June 26, 1992) (colleges and universities); Schiro v. Bynum, 375 U.S. 395 (1964)

The California Supreme Court and its special masters may have been motivated to create racially divided districts in part to follow this Court's construction of the federal Voting Rights Act, 42 U.S.C. 1971, et seq., in the case of Thornburg v. Gingles, 478 U.S. 30 (1986). The Enabling Clauses of the Fourteenth and Fifteenth Amendments, however, do not authorize Congress to enact statutes which affirmatively violate the substantive provisions of those amendments. While Congress does regularly exempt itself from laws it

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(auditoriums); Turner v. City of Memphis, 369 U.S. 350 (1962) (restaurants); State Athletic Comm'r v. Dorsey, 359 U.S. 533 (1959) (athletic contests); New Orleans City Park Imp. Association v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

imposes upon others in our society, it nonetheless may not exempt itself from the requirements of the U.S. Constitution. The Gingles case thus cannot possibly be construed to require or in any way authorize the purposeful racial segregation challenged here.

Applying the territorial residency restrictions imposed by § 100(a) of the California Elections Code to California's new purposely racially separate and segregative election districts violates the equal protection provisions of the Fourteenth and Fifteenth Amendments.

(d) Federal Voting Rights Act.

The 1982 Amendments to the federal Voting Rights Act, 42 U.S.C. 1973(a) & (b), were designed to alter the nature of the racial discrimination required to be shown by challengers in voting rights

cases from discriminatory "purpose" or "intent", to discriminatory "effect" or "impact". Sec. 1973(a) thus provides in part that "[n]o voting qualification or prerequisite to voting ... may be imposed ... which results in a denial or abridgment of the right of any citizen of the United States to vote..." and sec. 1973(b) provides further that "a violation of subsection (a) is established where, taking account of the totality of circumstances,... members of a class of citizens protected by subsection (a) ... have less opportunity than other members of the electorate ... to elect candidates of their choice." (Emphasis supplied.)

The artificial winner-take-all contests established by § 100(a) of the California Elections Code, however, have

a discriminatory effect on protected racial minority voters. Minor or minority geographical voting populations are guaranteed exactly proportional electoral representation and racial majority voters disproportionately benefit from majoritarian, winner-take-all elections. Protected racial minority voters, by contrast, are denied even the opportunity to obtain proportional electoral representation and are disproportionately disadvantaged, compared to majority white voters, by majoritarian, winner-take-all contests. These discriminatory effects, in turn, make plain under this "totality of circumstances" (42 U.S.C. 1973(b)) that racial minority voters have precisely "less opportunity" than "other members of the electorate" (id.) (emphasis supplied)

(both minority geographical voters and majority racial voters) actually to elect candidates of their choice to Congress.

(e) Political speech and association.

The territorial residency restrictions imposed by § 100(a) of the California Elections Code infringe upon core political expression and association interests protected in the First Amendment. The restrictions prevent each voter from participating in more than 98% of the congressional election contests across the State representing more 98% of all of the other voters and candidates in California.

This severe contraction of political rights is not only directed squarely at silencing all non-local, or statewide, political expression (federal voting), but also strongly distorts the protected

"marketplace of ideas" across the State toward majoritarian, and incumbent (or established) ideas and interests, and away from all minor or minority, and challenger (or new) ideas and interests.

Non-residents are prohibited from voting in particular, local district contests precisely because they do not share the peculiar local ideas and interests of its residents.[14] Resulting majoritarian, winner-take-all elections also skew election results systematically toward all major or majority ideas and interests and away from all minor or minority ideas and interests (including those held by racial minority, female,

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[14] For this Court's most-recent case involving content-based speech restrictions under the First Amendment, see R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (June 22, 1992) (invalidating municipal ordinance directed only at racial or ethnic "hate speech").

and young voters specifically protected in each of the Fifteenth, Nineteenth and Twenty-Sixth Amendments).[15]

Finally, these restrictions strongly favor the class of all incumbent candidates and their supporters over the class of all challenger candidates and their supporters. For a variety of reasons, incumbents as a class simply make for stronger, more competitive candidates than challengers. Indeed, in recent years incumbent candidates have enjoyed re-election rates as high as 96 to 98%. With district residency

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[15] For first articulation of "free marketplace of ideas" concept, see Chief Justice Holmes' statement in dissent in Abrams v. United States, 250 U.S. 616, 630 (1919). And compare Chief Justice Holmes' apparent views on the geographically based, single-member district mode of election at issue in the instant case as related by Prof. H.A. Overstreet in a March 4, 1916, article in the New Republic magazine, excerpted in C. Hoag & G. Hallett, Proportional Representation at App. II, p. 303 (1926).

restrictions, however, incumbents rarely if ever have to run against each other for re-election. At the same time, however, challengers almost always have to face and defeat a sitting incumbent to be elected. This discriminatory classification in turn has a devastating effect on the ability of challenger candidates actually to gain election to Congress.[16]

Residency restrictions also impermissibly burden core interests in both intra- and inter-state political association. Like-minded voters and candidates across the State are literally absolutely prohibited from associating

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[16] For a recent decision invalidating election laws found to discriminate against challengers in favor of incumbents, see Service Employees International Union v. Fair Political Practices Commission, 955 F.2d 1312 (9th Cir. 1992) (campaign finance laws invalidated), cert. denied, 112 S. Ct. 3057 (1992).

together at the ballot box to support common candidates and political interests. All voters and candidates are restricted to the narrow confines of their own local districts.

Inter-state association is also burdened. Various minor and minority interests across the nation -- prevented from coalescing within their states and thereby actually electing candidates of their choice -- are also thereby blocked from associating <u>across state boundaries</u> through representatives of their choice <u>within</u> the national House of Representatives.[17]

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[17] For case upholding federal voters' interests in inter-state political association, see, <u>Anderson v. Celebrezze</u>, 460 U.S. 780 (1982) (invalidating restrictions on access to Presidential ballot in part on ground of inter-state freedom of association).

Please note that, contrary to the lower court's apparent assumption, Appellant Rivas, a resident and qualified federal voter

The freedom from association, or against forced political association, is also infringed. With local residency restrictions, all voters are forced in effect to "bloc" vote with their neighbors. And this is so even though they are selecting what is, after all, a statewide, federal representative delegation. Such restrictions severely burden all voters' fundamental interests against forced or compelled political association.[18]

In sum, by blocking voters from taking part in fully 98% of the various

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from Virginia, in fact claims no right to vote in California's congressional elections in this case. Cf. Opinion and Judgment of Dismissal, App. A, infra, at p. 4. Rather, his interest in California's election process comes only through this inter-state association claim.

[18] Cf. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (upholding union members' interests against compelled political association).

federal election contests taking place within their State, the territorial residency restrictions in § 100(a) of the California Elections Code impose severe burdens on the sovereign people of California freely to express their core political ideas and interests -- and to associate and interact freely among themselves -- in selecting their state's federal congressional delegation.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

ARLO HALE SMITH
(Counsel of Record)

TIMOTHY A. DeWITT
Attorneys for Appellants

November 1992

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CV 92-0510-CAL

TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, RENE A. RIVAS, Plaintiffs,

vs.

THOMAS S. FOLEY, Speaker of the U.S. House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of California, Defendants.

OPINION AND JUDGMENT OF DISMISSAL

[Filed Aug. 31, 1992]

Before NOONAN, Circuit Judge, LYNCH and LEGGE, District Judges.

LEGGE, District Judge:

I.

Defendants have moved to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)3 and 12(b)6. The

motion was opposed, heard and submitted for decision. The court has considered the moving and opposing papers, the record, the arguments, and the applicable authorities. The court concludes that plaintiffs' challenges to district elections are not supported by the United States Constitution, federal statutes, the California Constitution, California statutes, or case law. The court therefore concludes that the action should be dismissed.

II.

Title 28 U.S.C. § 2284(a) provides for a three-judge court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." Defendants argue that plaintiffs are not entitled to this three-judge court because they are

challenging the constitutionality of preestablished districts, rather than the allocation of representatives among those districts. Defendants cite Members of California Congressional Delegation v. Eu, 790 F.Supp. 925, 926 n.1 (N.D. Cal. 1992), for the proposition that "'reapportionment' describes the process of allocating representatives among pre-established districts."

The statute refers to "apportionment," not "reapportionment." Plaintiffs here challenge the fact of apportionment among districts, rather than the manner in which those districts have been drawn. This is sufficient to bring them within the ambit of the statute.

III.

Plaintiffs are three residents of

California's seventh congressional district, and one resident of the state of Virginia. In the 1990 primary and general elections, the California plaintiffs attempted to vote for candidates outside the seventh district by writing different district numbers on their ballots and writing in the names of candidates in those other districts. They allege that they want to associate with like-minded voters across the state to elect congressional representatives. The Virginia plaintiff wants to associate with like-minded Latino voters across state lines by voting in California's congressional elections.

The complaint attempts to allege seventeen claims for relief. The first through ninth and eleventh through fifteenth are that § 100 of the

California Elections Code violates a number of provisions of the U.S. Constitution[1] and the federal Voting Rights Act, 42 U.S.C. § 1971 et seq. The tenth claim is that the creation of special minority districts, which was done in California under the Voting Rights Act, violates the Fourteenth, Nineteenth, and Twenty-Sixth Amendments. The sixteenth claim is that 2 U.S.C. § 2(c), Article XXI, § 1 of the California Constitution, and § 2500 of the California Elections Code, which require the establishment of single-member congressional districts, violate the same provisions of the U.S. Constitution and the Voting Rights Act. Finally, the seventeenth claim is that the recent

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[1] Art. I, § 2, cl. 1, 2, and 3: Art. IV, § 4; and the First, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments.

redistricting by the California Supreme Court, which was considered by this court in Congressional Delegation v. Eu, supra, violated Article I, § 4 of the U.S. Constitution, because such redistricting must be done by Congress or state legislature, and not by the courts.

The gravamen of these claims is that minority groups (whether by race, sex, age or political orientation) are unable to obtain representation in proportion to their numbers; because while they may have enough votes state-wide to elect a representative, they rarely constitute a majority within a congressional district. This allegedly perpetuates a House of Representatives composed of predominantly white male incumbents, in an increasingly heterogeneous society.

IV.

Plaintiffs' complaint concerns both federal and California law.

The U.S. Constitution contains the qualifications for voters and candidates for Congress. Article I, § 2, clause 1 of the United States Constitution sets forth the requirements for persons entitled to vote for representatives as follows (the "Voter Qualifications" clause):

> [T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Clause 2 of that same section sets forth the qualifications for representatives themselves (the "Candidate Qualifications" clause):

> No Person shall be a Representative who shall not have attained to the Age of twenty five years, and been

> seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

The Constitution also empowers both Congress and the state legislatures to make rules governing the time, place and manner of holding these elections. Section 2 of the Fourteenth Amendment amended the third clause of Article I, § 2 (the "Apportionment" clause) to provide that

> Representatives shall be apportioned among the several States according to their respective numbers . . . .

Article I, § 4 provides that

> The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .

Congress' authority here is

paramount. Congress has enacted legislation requiring the states to establish single member districts, 2 U.S.C. § 2(c). That statute requires each state entitled to more than one representative to:

> establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . . .

California's Constitution also requires that the legislature establish, and that representatives be chosen from, single-member districts. Article XXI, § 1, is entitled "Reapportionment," and provides that after each decennial national census, "the Legislature shall adjust the boundary lines of the . . . Congressional . . . districts." The

districts shall be "reasonably equal" in population, and "[e]ach member of the . . . Congress shall be elected from a single member district." Id. at § 1(b), 1 (a).

The California Elections Code also provides for single member districts, and allows voters to vote only in the "territory" in which they reside. California Elections Code § 25000(a) states that "[o]ne Representative [shall be elected to the Congress of the United States] for each congressional district." Section 100(a) provides that otherwise qualified persons "may vote at any election held within the territory within which he or she resides and the election is held." Neither § 100 nor its relatives purport to define "territory." Plaintiffs argue that this section imposes a voter residency requirement not

found in any other constitutional or statutory provision.

V.

Defendants Governor Wilson and Secretary of State Eu move to dismiss the complaints, primarily on the ground that Article I, § 4 of the U. S. Constitution, which gives Congress the authority to prescribe the "times, places and manner" of holding elections for representatives, gives it the power to require that representatives be elected by district. Congress exercised that power in enacting 2 U.S.C. § 2(c), which is binding on the states. Assembly v. Deukmejian, 30 Cal.3d 638, 662: 180 Cal.Rptr. 297, 311 (1982) (2 U.S.C. § 2(c) "forbids the use of-statewide elections to fill congressional seats").

A.

There are no cases squarely defining Congress' power under Article I, § 4 to require that representatives be elected by district. However this court concludes that this power is supported by case law and by documents which are part of the "legislative history" of that article.

As will be discussed below, Congress first exercised that constitutional power in 1842, requiring election by single member districts. In 1879 the U.S. Supreme Court assumed, without discussion, that this exercise of power was constitutional. Congress effectively repealed the requirement that representatives be elected from single member districts in 1929, and reenacted it in 1967. In 1970, a Justice of the

Supreme Court concluded that "the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of Congressional districts." Oregon v. Mitchell, 400 U.S. 112, 121 (1970) (opinion of Black, J.).

B.

At the Constitutional Convention of 1787, the Committee of Detail proposed draft language similar to the final version of Article I, § 4:

> The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time be altered by the Legislature of the United States.

Madison, Notes of Debates in the Federal Convention of 1787 (Ohio Univ. Press 1966) at 387.

Two delegates opposed giving Congress any power over such matters, contending that the states could and must be relied upon. Madison addressed the Convention:

> [T]he legislatures of the States ought not to have the uncontrolled right of regulating the times places and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should . . . be divided into districts or all meet at one place, should all vote for all the representatives; or all in a district vote for a number allotted to the district . . . .

Id. at 423-24 (emphasis added).

Three other delegates agreed that Congress should have the ultimate authority over the time, place, and manner of choosing representatives, and the debate was at an end. The draft was

adopted unanimously. Id. at 424-25. That is clear evidence that the power to prescribe the "places and manner" of elections, reposed in the first instance in the several States and ultimately in the Congress, includes the power to prescribe that they be held by district. See Wesberry v. Sanders, 376 U.S. 1, 33-34 (1964) (Harlan, J., dissenting) ("These remarks of Madison . . . [s]upported by others at the Convention, and not contradicted in any respect . . . indicate as clearly as may be that the Convention understood the state legislatures to have . . . the power to district well or badly, subject only to the supervisory power of Congress. . . . The debates in the ratifying conventions, as clearly as Madison's statement . . . indicate that under § 4, the State

legislatures, subject only to the ultimate control of Congress, could district as they chose").

This conclusion is bolstered by the U. S. Supreme Court's observation that:

> Madison in The Federalist described the system of division of States into congressional districts, the method which he and others assumed states probably would adopt: "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives."

Wesberry v. Sanders, 376 U.S. 1, 15 (1964) (quoting The Federalist, No. 57 (Cooke ed. 1961), at 389). See also, The Federalist No. 56 (dividing large states into districts promotes knowledge of local interests); Oregon v. Mitchell, 400 U.S. 112, 120 n.2 (1970) ("[The state legislatures] might make an unequal and

partial division of the states into districts for the election of representatives . . . . Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy" (quoting Mr. Parsons of the Massachusetts ratifying convention)).

It is true, as argued by plaintiffs, that six or seven of the conventions of the thirteen ratifying states proposed that Congress' power to modify the regulations adopted by the states be limited to situations where the states "shall neglect, or refuse or be unable" to make such regulations. See Cong. Globe, 27th Cong., 2d Sess., 465-66 (remarks of Sen. Wright). However, as the Supreme Court has noted, "Such an amendment was never adopted." Oregon v.

Mitchell, 400 U.S. at 119 n.2.[2]

After considering the history of Article I, § 4, Justice Black concluded that:

> the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers argued . . . that Congress would "most probably lay the state off into districts." And in Colegrove v. Green, 328 U.S. 549 (1946), no justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Oregon v. Mitchell, 400 U.S. 112, 121

---

[2] Even among these states, New York observed that "nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing laws . . . to divide such State into convenient districts, and to apportion its Representatives to and amongst such districts." Remarks of Sen. Wright, supra, at p. 466 (emphasis added).

(1970) (opinion of Black, J.).

C.

Congress did not exercise its power to require that states elect representatives by district until 1842. 5 Stats. 491. Congress' efforts in that regard were summarized by the Supreme Court in Colegrove v. Green, 328 U.S. 549 (1946):

> Until 1842 there was the greatest diversity among the states in the manner of choosing Representatives because Congress had made no requirement for districting. Congress then provided for the election of Representatives by districts. Strangely enough, the power to do so was seriously questioned: it was still doubted by a Committee of Congress as late as 1901. In 1850 Congress dropped the requirement. The Reapportionment Act of 1862 required that the districts be of contiguous territory. In 1872 Congress added the requirement of substantial equality of inhabitants. This was reinforced in 1911. But the

> 1929 Act . . . dropped these requirements.

Id. at 555 (citations omitted). In Wood v. Broom, 287 U.S. 1 (1932), the Court held that Congress' omission of the compactness, contiguity, and equality of population requirements from the 1929 Act effectively repealed these requirements. Id. at 6-7. Congress took no further action to require election by single member districts until it passed the statute presently in force, 2 U.S.C. § 2(c), in 1967. 81 Stat. 581.

D.

This long and continuous interpretation of Congress' powers under Article I, § 4 is persuasive.

In Smiley v. Holm, 285 U.S. 355 (1932), the Supreme Court stated:

> The practical construction of Article I, section 4, is impressive. General

> acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political right and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no clear and definite support for a contrary construction as to justify disregard of the established practice in the States.

Id. at 369 (citations omitted).

Congress' exercise of its power to require elections by single-member districts over the past 150 years, coupled with the Supreme Court's tacit approval, in Ex Parte Siebold, 100 U.S. 371 (1879); Ex Parte Yarbrough, 110 U.S. 651 (1884); United States v. Gradwell,

243 U.S. 476 (1917);[3] Smiley v. Holm; United States v. Classic, 313 U.S. 299 (1941);[4] Oregon v. Mitchell, and Buckley v. Vallejo, 424 U.S. 1 (1976),[5] constitute a "long and continuous interpretation" that such action is constitutional.

We also note two recent decisions of the Court which have upheld congressional

---

[3] "Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been settled by repeated decisions of this court." Id. at 482 (citations omitted).

[4] "[T]he states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under the Necessary and Proper clause]." Id. at 315 (citations omitted).

[5] "The constitutional power of Congress to regulate federal elections is well established . . . ." Id. at 13 (citations omitted).

discretion, U.S. Department of Commerce v. Montana, ___ U.S. ___, 112 S.Ct. 1415 (1992), and state discretion, Burdick v. Takushi, ___ U.S. ___, 112 S.Ct. 2059 (1992) in voting rights limitations.

E.

Plaintiffs argue that whatever Congress' power under Article I, § 4, it cannot exercise that power in a way that alters the qualifications of candidates and voters. They contend that limiting voters to the districts in which they live imposes a "qualification" on them not authorized by the U. S. Constitution. As Alexander Hamilton stated in The Federalist, No. 60:

> [Congress'] authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion,

> are defined and fixed in the constitution; and are unalterable by the legislature.

(quoted with approval in Powell v. McCormack, 395 U.S. 486, 539 t1969) ("immutability of qualifications set forth in [Article I, § 2, cl. 2 of] the Constitution").

The Powell Court approved the decision of Congress in the 1807 election case of William McCreery of Maryland. Maryland had enacted a law requiring one of the two representatives from Baltimore County to be a resident of Baltimore City. Mr. McCreery was duly elected, but his residence was questioned. The House Committee of Elections recommended that he be seated, because it

> considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the

> Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them . . . .

Powell, 39S U.S. at 542-43 (quoting 17 Annals of Cong. 872 (1807)).

The Committee concluded that the local residency requirement was an attempt by the state of Maryland to impose an additional qualification on members, and was therefore unconstitutional. 1 A. Hinds, Precedents of the House of Representatives of the United States § 414 (1907). However, even those who urged this position were of the opinion that:

> The States might establish districts, but they might not prescribe that Representatives should be confined to the districts.

Id. at p. 383.

Similarly, Article I, § 2, clause 1

of the Constitution prescribes the qualifications for voters in congressional contests in the states, which the states may not alter:

> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications of voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

Yarbrough, 110 U.S. at 663. And in Oregon v. Mitchell, 400 U.S. 112, (1970), Justice Black opined that:

> Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional

> districts. The Framers expected Congress to use this power to eradicate "rotten boroughs," and Congress has in fact used its power to prevent States from electing all Congressmen at large.

Id. at 122 (opinion of Black, J.) (emphasis in original).

Plaintiffs argue the following analogy: just as imposing a residency requirement on candidates violates the candidate qualifications clause, imposing a residency requirement on voters violates the voter qualifications clause. So long as a candidate is a resident of the state, he or she may run for any seat in the state; so long as a voter resides in the state, he or she may vote for any candidate running in any congressional contest in the state. But plaintiffs' analogy is artificial and is not consistent with the language of Article

I, Section 2.

The candidate qualifications clause states that "[n]o person shall be a Representative who shall not . . . when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. Atr. I, Sec. 1, cl. 2. The clause prescribes a closed-universe of "qualifications" for representatives, which may not be added to, subtracted from, or altered. One of the "qualifications" enumerated is residency within the state.

The voter qualifications clause, on the other hand, states that representatives shall be chosen by electors who "shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature." U.S. Const. Art., I, Sec.

1, cl. 1. In California, that branch is the state Assembly, whose members are elected in single-member districts. Thus, if the geographic location of electors within a state were deemed a "qualification," voters could only vote for representatives by Assembly district, resulting in a congressional delegation either larger or smaller than that prescribed by Congress under Article 1, Sec. 2, cl. 3.

The requirement that voters reside within the congressional district in which they vote is therefore more properly understood as a restriction on the "place" or "manner" of election, which both Congress and the state legislature are empowered to prescribe.

This distinction is also implicitly recognized in California Elections Code §

100(a), challenged by plaintiffs, which provides that:

> Every person who qualifies under Section 2 of Article II of the Constitution . . . may vote at any election within the territory within which he or she resides.

(Emphasis added.) Article II, Section 2 of the California Constitution provides that "A United States citizen 18 years of age and resident in this state may vote." These are the only "qualifications" imposed on voters.

F.

Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned. The "antiquated states-rights doctrine" relied upon by those who originally opposed Congress' exercise of this power has been discredited, as noted by the majority in

Parsons v. Sanders [full cite]. And it is settled law that the Framers intended to give Congress and the states the power to draw congressional districts as a part of the "manner" of elections.

The states' power to regulate the "time, place and manner" of congressional elections within its borders is coextensive with that of Congress, although Congress' authority is paramount. The power is conferred by the same words, in the same section of the same instrument. Therefore, since 2 U.S.C. § 2(c) is constitutionally valid, so are the California constitutional and statutory provisions challenged by plaintiffs.

VI.

Plaintiffs argue that Article I, § 4 does not answer their claims based on

subsequent amendments to the Constitution-the First, Tenth, Fourteenth, Fifteenth, Nineteenth and Twenty-Sixth amendments, the violation of which is alleged in their fourth and sixth through thirteenth claims. Specifically, plaintiffs argue that district elections discriminate in favor of incumbent candidates in violation of the First Amendment, and that the establishment of special minority districts under the Voting Rights Act violates the prohibition against "separate but equal" in the Fourteenth and Fifteenth amendments, and articulated by the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954). Plaintiffs argue that these subsequent amendments "trump" whatever power was conferred by Article I, § 4, and that

Article I power cannot be exercised inconsistently with those amendments. In view of the authorities cited above in section V above, we need discuss only two specific claims made by plaintiffs.

Plaintiffs' fourth claim is that the residency requirement violates the one-person, one-vote principle of the Voter Qualifications clause and the Equal Protection clause of the Fourteenth Amendment, because of the "physical impossibility of ensuring" that the districts will contain "exactly equal numbers of people." However, the U. S. Supreme Court recently reaffirmed the holding of Wesberry v. Sanders, 376 U.S. 1 (1964) that those provisions only require states to "make a good-faith effort to achieve precise mathematical equality." United States Dept. Commerce

v. Montana, 112 S.Ct. 1415, 1418 (1992) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969)). Exact equality is not required.

Plaintiffs' ninth claim is that the residency requirements result in winner-take-all contests that "deprive racial minority groups of even the opportunity to obtain representation in proportion to their voting strength," in violation of the Voting Rights Act, 42 U.S.C. § 1971 et seq. The basic objective of the Voting Rights Act is to protect minority voting opportunities, which objective has been pursued in the reapportionment of California's congressional districts. Even if that objective were not, as plaintiffs allege, fully accomplished, a later statute cannot "trump" the original provisions of

the Constitution. The Constitution must be superior.

District elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference.

VII.

Certain additional arguments of the parties need be answered only briefly.

Plaintiffs' seventeenth claim is that the California Supreme Court had no authority to draw congressional districts, and that "[I]f the people and their elected representatives fail to establish congressional districts desired, but not established, by Congress, Congress's remedy under the elections clause lies not in the courts

but in itself." However, there is a long history of court participation in redistricting when the elected branches do not do so. See authorities cited in Members of California Congressional Delegation v. Eu, 790 F.Supp. 925 (N.D. Cal. 1992).

Defendants argue that venue in this district is improper and that plaintiffs are guilty of laches. In view of the conclusions which this court reaches above, no further consideration of these arguments is necessary. For the same reasons, the motions which have been filed by plaintiffs and by defendant Thomas S. Foley after the submission of this motion to dismiss are denied.

IT IS THEREFORE ORDERED that defendants' motion is granted and the action is dismissed. Because the

infirmities of the complaint are matters of law and could not be corrected by amendment, the dismissal is without leave to amend. A judgment of dismissal is hereby entered.

Dated: August 31, 1992.

[signed]

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

[signed]

JOHN T. NOONAN, JR.
CIRCUIT JUDGE

[signed]

EUGENE F. LYNCH
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. CV-92-0510-CAL

TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, RENE A. RIVAS, Plaintiffs,

vs.

THOMAS S. FOLEY, Speaker of the U.S. House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of California, Defendants.

[Stamped: Filed Sept. 11, 1992]

NOTICE OF APPEAL

TO THOMAS S. FOLEY, Speaker of the United States House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of

California, and DANIEL E. LUNGREN, LINDA A. CABATIC, ALLEN H. SUMNER, and STEVEN R. ROSS, CHARLES TIEFER, and MICHAEL L. MURRAY, their attorneys of record:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1253 and Supreme Court Rules 18, Plaintiffs TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, and RENE A. RIVAS will and hereby do appeal in its entirety as to all issues raised in the above-captioned action this Court's summary final Opinion and Judgment of Dismissal with prejudice of August 31, 1992.

Dated: September 11, 1992.

Respectfully submitted,

Arlo Hale Smith -- Bar No. 96971
Timothy A. DeWitt -- Bar No. 150631

By: [Signed]
Timothy A. DeWitt

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. CV-92-0510-CAL

TIMOTHY A. DeWITT, et al.,

Plaintiffs,

vs.

THOMAS S. FOLEY, et al.,

Defendants.

[Stamped: Filed Sept. 11, 1992]

CERTIFICATE OF SERVICE

I, Timothy A. DeWitt, do hereby certify that on this 11th day of September, 1992, I served the Notice of Appeal filed herewith by first-class mail, postage pre-paid, on the following:

Michael L. Murray, Esq.
Assistant General Counsel
Clerk to the U.S. House of
Representatives
The Capitol, H-112
Washington, D.C. 20515
(Counsel for Defendant Thomas S.
Foley)

Allen H. Sumner, Esq.
Assistant Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, Calif. 94244-2550
(Counsel for Defendants Wilson and
Fong Eu)

[Signed]
Timothy A. DeWitt

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clauses 1, 2, and 3 of the United States Constitution provide:

> The House of Representatives shall be composed of Members chosen every second Year by the people of the several States, and the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to service for a Term of Years, and including Indians not taxed, three-fifths of all other Persons....

2. Article I, Section 4 of the U.S. Constitution provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Place of Choosing Senators.

3. Article IV, Section 4 of the U.S. Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government....

4. Amendment I of the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5. Amendment X of the U.S. Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

6. Amendment XIV, Section 1 of the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7. Amendment XV, Section 1 of the U.S. Constitution provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

8. Amendment XIX, Section 1 of the U.S. Constitution provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

9. Amendment XXVI, Section 1 of the U.S. Constitution provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

10. The federal Voting Rights Act, 42 U.S.C. 1973(a) & (b) provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect candidates of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

11. The Act of Dec. 14, 1967, 81 Stat. 581, now codified at 2 U.S.C. 2c (1967), provides:

> [T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.

12. Article XXI, Section 1 of the California State Constitution provides:

> In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Legislature shall adjust the boundary lines of the...Congressional...districts in conformance with the following standards: (a) Each member of...Congress...shall be elected from a single-member district....

13. California Elections Code, Division 1. Voters, Chapter 1. Qualifications, Sec. 100(a) provides:

> Every person who qualifies under Section 2 of Article II of the Constitution and who complies with...this code governing the registration of electors may vote at any election held within the territory within which he or she resides and the election is held.

14. Section 25000 of the California Elections Code provides:

> At each general election there shall be elected to the Congress of the United States: (a) One Representative from each Congressional district....

No. 92-805

FILED
DEC 3 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

TIMOTHY A. DeWITT, et al.,

Appellants,

v.

THOMAS S. FOLEY, et al.,

Appellees.

On Appeal From The United States
District Court For The
Northern District Of California

MOTION OF APPELLEES GOVERNOR OF CALIFORNIA PETE WILSON AND SECRETARY OF STATE MARCH FONG EU TO AFFIRM

DANIEL E. LUNGREN
Attorney General
of the State of California
FLOYD D. SHIMOMURA
Assistant Attorney General
LINDA A. CABATIC, Supervising
Deputy Attorney General
*ALLEN SUMNER
Assistant Attorney General
1515 K Street
Sacramento, CA 95814
(916) 324-5463

Attorneys for Appellees Pete Wilson and March Fong Eu

*Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Is the requirement of 2 U.S.C § 2c that Representatives be elected in single-member districts a valid exercise of Congress' authority to prescribe the "times, places and manner of holding elections" for its members under Art. I, § 4, of the Constitution?

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2 J. Elliott's *Debates on the Federal Constitution* 27 (1876) 10

"Brutus" Essay IV, to the People of the State of New York, November 29, 1787, *The Anti-Federalist Papers* (Ketcham ed. 1986) at p. 329 10

Madison, Notes of Debates in the Federal Convention of 1787 (Norton 1987) at p. 85 9

Rev. Stats. of 1873-74, §§ 5506 to 5532 12

"Speech of Patrick Henry to the Virginia Ratifying Convention," *The Anti-Federalist Papers* (Ketcham ed. 1986) at p. 329; June 7, 1788, p. 215 10

The Federalist, No. 59 (Mentor 1961) at p. 363 9

No. 92-805

In The

Supreme Court of the United States

October Term, 1992

TIMOTHY A. DeWITT, et al.,

Appellants,

v.

THOMAS S. FOLEY, et al.,

Appellees.

On Appeal From The United States District Court For The Northern District Of California

MOTION OF APPELLEES GOVERNOR OF CALIFORNIA PETE WILSON AND SECRETARY OF STATE MARCH FONG EU TO AFFIRM

Appellees Pete Wilson, Governor of the State of California, and Secretary of State March Fong Eu hereby move this Court, pursuant to Rules of the Supreme Court, Rule 18.6, to affirm the judgment of the United States District Court for the Northern District of California on the grounds that the question presented by this appeal is without merit and needs no further briefing or argument.

STATEMENT OF THE CASE

A. Summary of Material Facts

As stated in the opinion below:

> "Plaintiffs are three residents of California's seventh congressional district, and one resident of the state of Virginia. In the 1990 primary and general elections, the California plaintiffs attempted to vote for candidates outside the seventh district by writing different district numbers on their ballots and writing in the names of candidates in those districts. They allege that they want to associate with like-minded voters across the state to elect congressional representatives. The Virginia plaintiff wants to associate with like-minded Latino voters across *state* lines by voting in California's congressional elections." Slip opinion, Appen. A, *infra*, pp. 2-3; emphasis in original.

The Congressional redistricting plan which appellants challenge was ordered by the California Supreme Court in January of 1992. *Wilson v. Eu*, 1 Cal.4th 707 (1992). The Court accepted and adopted, as modified, a redistricting plan proposed by three special masters appointed by the Court four months earlier in light of the failure of the Legislature of California to adopt a plan for the 1992 primary and general elections. *Wilson v. Eu*, 54 Cal.3d 471 (1991).[1] The redistricting plan allocates

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[1] The masters held six days of public hearings in Los Angeles, Sacramento, San Diego and San Francisco. *Wilson v. Eu, supra*, 1 Cal.4th at 713. Oral and written testimony was received on a number of topics relating to redistricting, as well as 22 separate redistricting plans proffered by various inter-

California's Congressional Representatives into 52 single-member districts.

B. Summary of Procedural History

On January 29, 1992, appellants filed a complaint challenging the redistricting plan for California's congressional delegation. Specifically, appellants alleged that 2 U.S.C § 2c[2], which requires election of Representatives

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ested parties. *Id.*, at p. 742. The masters additionally reviewed transcripts from 12 public hearings on redistricting held by the California Senate between December 1990 and September 1991. *Ibid.* Appellants failed to participate in any of these hearings.

Upon presentation of the masters' report, the California Supreme Court itself then accepted additional written comments and amici curiae briefs from interested parties before adopting the masters' plan, as modified. *Id.*, at p. 720. Again, no comment was received from appellants.

Following adoption of the California Supreme Court's plan, a three-judge panel of the District Court dismissed a challenge to the plan unrelated to appellants' action on the grounds of abstention, stating: "We have no doubt that the state proceedings here provided the required due process for the adjudication of the federal issues." *Members of Democratic Cong. Delegation v. Eu*, 790 F. Supp. 925, 932 (N.D. Cal. 1992).

[2] Section 2c, enacted in 1967, provides in relevant part:

> "In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . . "

by single-member districts, and the implementing provisions of the California Constitution, Art. XXI, § 1(a)[3], and Elections Code § 25000[4], are unconstitutional. The complaint alleged seventeen separate claims for relief, contending, inter alia, that election by single-member districts violates Art. I, § 2, cl. 1, 2, and 3, Art. IV, § 4, and the First, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the Constitution, as well as the federal Voting Rights Act, 42 U.S.C. § 1971 et seq. The court below summarized:

> "The gravamen of these claims is that minority groups (whether by race, sex, age or political orientation) are unable to obtain representation in proportion to their numbers; because while they may have enough votes state-wide to elect a representative, they rarely constitute a majority within a congressional district. This allegedly perpetuates a House of Representatives composed of predominantly white male incumbents, in an increasingly heterogeneous society." Appen. A at p. 4.

On March 16, 1992, state defendants Governor Wilson and Secretary of State Eu moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure,

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[3] Article XXI, § 1(a) provides in relevant part: "Each member of . . . Congress . . . shal' be elected from a single-member district."

[4] Section 25000 states in relevant part: "At each general election there shall be elected to the Congress of the United States: (a) One Representative for each congressional district. . . . "

Rule 12(b), for, inter alia, failure to state a claim upon which relief may be granted.[5]

The motion was argued on May 5, 1992, before a three-judge panel of the District Court for the Northern District of California pursuant to 28 U.S.C § 2284(a). On August 31, 1992, the court granted defendants' motion, dismissing the action without leave to amend. Appen. A.

Notice of Appeal was filed on September 11, 1992.

On September 15, 1992, appellants applied to Justice O'Connor, as Circuit Justice for the Ninth Circuit, to stay the opinion below and enjoin defendants from either administering the November 3 general election or giving effect to the June 2 primary election of California's Congressional delegation. The application for stay and injunctive relief was denied by Justice O'Connor on September 22.

On October 2, 1992, appellants "renewed" their application for stay and injunctive relief, this time directing the application to Justice Scalia. The application was denied by Justice Scalia on October 13.

Appellants' Jurisdictional Statement was then received on November 5, 1992, prompting this Motion To Affirm.

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[5] Defendants also moved to dismiss on the basis of plaintiffs' laches in waiting to file their challenge until the eve of California's primary election. The court held that in view of its judgment dismissing the action for failure to state a claim upon which relief may be granted, it need not address the question of laches. Appen. A at p. 19.

STATEMENT

This case involves the sole issue of whether Congress has the authority under Art. I, § 4, of the Constitution to prescribe the "times, places and manner of holding elections" for its members include the power to require that election be by single-member district as provided in 2 U.S.C § 2c.[6]

Clearly, it does. As detailed below, Congress required election by single-member districts over 150 years ago; this Court has recognized the validity of single-member districts since *1879*. In dismissing appellants' complaint, the district court aptly summarized, "Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned." Appen. A at p. 17. This appeal presents no issue requiring further briefing, argument or consideration by this Court.

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[6] Appellants also challenge the authority of the California Supreme Court to order redistricting in the face of failure by the California Legislature to enact a plan in time for the state's primary and general elections. The same argument was raised below and dismissed by the court in one sentence: " . . . there is a long history of court participation in redistricting when the elected branches do not do so. See authorities cited in *Members of California Congressional Delegation v. Eu*, 790 F. Supp. 925 (N.D. Cal. 1992)." Appen. A at p. 19.

Almost 30 years ago this Court declared: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by the Court but appropriate action by the State in such cases has been specifically encouraged. [citations.]" *Scott v. Germano*, 381 U.S. 407, 409 (Per Curiam) (1964). This issue requires no further attention from the Court.

Accordingly, the judgment of the District Court should be affirmed.

ARGUMENT

I

DEFENDANTS ARE BOUND BY CONGRESS' DETERMINATION THAT ELECTIONS BE HELD IN SINGLE-MEMBER DISTRICTS

The role of state appellees Governor Wilson and Secretary of State Eu in this action is merely "formalistic," arising solely from their responsibility to conduct California's Congressional elections using the single-member districts adopted by the California Supreme Court. *Members of California Democratic Cong. Delegation v. Eu, supra,* 790 F. Supp at 728.

In fashioning the instant redistricting plan, the California Supreme Court was "guided by" its previous redistricting decisions. *Wilson v. Eu, supra,* 1 Cal.4th at 713. Those decisions in turn cite Congress' mandate of single-member districts as binding upon the State of California. *Legislature v. Reinecke,* 6 Cal.3d 595, 603 (1972).[7]

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[7] In creating the Congressional districts here at issue the California Supreme Court's masters were primarily guided by this Court's directions in *Karcher v. Daggett,* 462 U.S. 725 (1983). *Wilson v. Eu, supra,* 1 Cal.4th at 717. *Karcher* directs:

> "Article I, § 2, establishes a 'high standard of justice and common sense' for the apportionment of congressional ***districts***: 'equal representation for equal numbers of people.' *Wesberry v. Sanders,* 376

Congress' mandate of election by single-member districts is the supreme law of the land and binding upon the state defendants. Art. VI, § 2.

II

CONGRESS HAS AUTHORITY TO REQUIRE ELECTION BY SINGLE-MEMBER DISTRICTS

Appellants acknowledge at the outset that there is no case expressly upholding Congress' authority to prescribe election by single-member districts. Thus plaintiffs, defendants and the court below have each had to make an exhaustive search of the history of Art. I, § 4, cl. 1.[8]: the drafters' debates over its wording, the arguments for and against ratification, the statutes Congress has enacted pursuant to this authority over the past 150 years, and this Court's analysis of those enactments. The full historical record is detailed in the District Court's opinion and defendants original motion to dismiss. Appen. A and B, respectively. For purposes of this motion to affirm, appellants offer a more condensed version.

U.S. 1, 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the 'equal representation' standard is enforced only to the extent of requiring that ***districts*** be apportioned to achieve equality 'as nearly as is practicable.'" *Id.*, at 730; emphasis added.

[8] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

A. The Founders Intended That Congress Have Authority To Ensure Its Members Are Elected By District

Alexander Hamilton termed Art. I, § 4, the most "completely defensible" provision of the entire Constitution: "Its propriety rests upon the evidence of this plain proposition, that ***every government ought to contain in itself the means of its own preservation.***" *The Federalist, No. 59* (Mentor 1961) at p. 363; emphasis in original.

From inception through ratification, those who drafted, debated, supported or opposed the Constitution all recognized that Congress would have authority to require that Representatives be elected by single-member districts.

The drafters' initial debate was whether Representatives should be elected directly by the people in ***districts***, or indirectly by state legislatures.[9] Once it was concluded that election should be directly by the people, the debate turned to whether Congress or the states should control the holding of these elections. Madison supported shared authority between Congress and the states over the "time, places and manner" of elections – including the authority to require election by district.[10]

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[9] George Mason and James Wilson of Virginia proposed direct " . . . election by the people in large ***districts*** which would be most likely to obtain men of intelligence and uprightness; subdividing the ***districts*** only for the accommodation of voters." Madison, *Notes of Debates in the Federal Convention of 1787* (Norton 1987) at p. 85; emphasis added.

[10] "These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary

The Constitution presented for ratification contained Art. I, § 4, in its present form, giving Congress the "wide latitude" over election of its members which Madison had argued for. This power – particularly the possibility that Congress would require election at-large as requested by appellants – was one of very the arguments raised in opposition to ratification.[11] Those supporting ratification countered that Congress must have this authority to correct unequal districts created by the states. 2 J. Elliott's *Debates on the Federal Constitution* 27 (1876); *Oregon v. Mitchell*, 400 U.S. 112, 120, n. 2 (1970).

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power. Whether the electors should vote by ballot or via voce; should assemble at this place or that place; should be divided into ***districts*** or meet all at one place; should all vote for all the representatives; ***or all in a district vote for a number allotted to the district***; these and many other points would depend on the Legislatures, and might materially affect the appointments. . . . What danger could there be in giving a controlling power to the National Legislature? Of whom was it to consist?" *Id.* at 423; emphasis added.

[11] "The proposed Congress may make the whole state one district, and direct that the capital (the City of New York, for instance) shall be the place for holding the election. . . . They may declare that those members who have the greatest number of votes, shall be considered as duly elected; the consequence would be that the people, who are dispersed in the interior parts of the state, would give their votes for a variety of candidates, while any order, or profession, residing in the populous places, by uniting their interests, might procure whom they pleased to be chosen – and by this means the representatives of the states may be elected by one-tenth part of the people who actually vote." "Brutus" Essay IV, to the People of the State of New York, November 29, 1787, *The Anti-Federalist Papers* (Ketcham ed. 1986) at p. 329; See also "Speech of Patrick Henry to the Virginia Ratifying Convention," June 7, 1788. *Id.* at p. 215.

Thus in both the drafting and ratification debates, each side recognized Congress' ultimate authority to decide if elections would be by districts. The question was only whether placing this power in Congress was the best way to in fact assure election by local districts – a goal shared by both sides.

B. Congress Has Exercised Its Power To Require District Election For 150 Years Without Challenge

Congress took no action regarding district elections for the first 50 years following ratification, resulting in great diversity among the states in the manner of choosing Representatives. *Colegrove v. Green*, 328 U.S. 549, 555 (1945). Some states did in fact elect all their Representatives on a single state ticket. *United States v. Gadwell*, 243 U.S. 476, 482 (1916).

In 1842 Congress enacted its first law requiring election of Representatives in single-member districts. Act of June 25, 1844, § 2, 5 Stat. 491; *Whitcomb v. Chavis*, 403 U.S. 124, 158, n 39 (1970). Congress acted to eliminate at-large elections because it concluded that the "general ticket system" worked an injustice both to other states which did not use it and to minority voters in those states which did. *Ex Parte Yarbrough*, 110 U.S. 651, 660 (1883). Congress' action in 1842 "signalled is belief that Representatives should be representative." *Montano v. Lefkowitz*, 575 F.2d 378, 385 (2nd Cir. 1978).

There is no history of any challenge to Congress' decision in 1842. However, 37 years later this Court

would cite Congress' action in a series of cases during the 1870's and 1880's dealing with various election reforms enacted to protect newly-freed black voters and implement the Fourteenth and Fifteenth Amendments. "Crimes Against the Elective Franchise and Civil Rights of Citizens," Rev. Stats. of 1873-74, §§ 5506 to 5532.

This Court sustained enactment of these statutes as within Congress' authority to prescribe the "times, places and manner" of elections pursuant to Art. I, § 4. Citing as precedent Congress' action 37 years earlier requiring single-member districts, this Court explained:

> "Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. ***No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.***" *Ex Parte Siebold*, 100 U.S. 371, 384 (1879); emphasis added.

This Court characterized Congress' authority under Art. I, § 4, as "plenary," *Id.* at 388, explaining: "The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient. . . . " *Id.* at 392. See also *Ex Parte Yarbrough, supra*, 110 U.S. 651, following and citing *Ex Parte Siebold* in upholding other convictions under the Civil War election reforms.

The requirement of single-member districts continued, with minor interruption, from 1842 until 1929. *Colegrove v. Green, supra*, 328 U.S. at 555. In 1929, however,

Congress omitted the requirement in implementing the Fifteenth Census. 46 Stat. 21, c. 28. Although Congress did not expressly repeal the previous express requirement of single-member districts, this was the result of its action. *Wood v. Brown*, 287 U.S. 1, 6 (1932).

Elimination of single-member districts of equal population led again to disparity and malapportionment between districts, this time forcing the Court itself to intervene. *Wesberry v. Sanders*, 376 U.S. 1 (1963).

Although Congress' authority pursuant to Art. I, § 4, was not directly in issue in *Wesberry*, it was cited by both the majority and dissent. The majority pointed to the Founders' debates as clear intent that Congress was to have the power to ensure equal representation, including by districts. *Id.*, at 16. Justice Harlan's dissent argued that Congress' authority under Art. I, § 4, was the very reason why the Court should not act. *Id.*, at 30. Following the Founders' debates of a century before, both sides accepted as given Congress' authority to act. Now the question was the Court's responsibility should Congress fail to do so.

Four years after *Wesberry*, Congress enacted the present 2 U.S.C. § 2c, again expressly requiring election by single-member districts. Courts have characterized the debates over this provision in 1967 as "echoing the views of their predecessors of 1842 with respect to the representative nature of representatives," *Montano v. Lefkowitz*, *supra*, 575 F. 2d at 385, and having "made clear their distaste for at-large elections." *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 927 (W.D. Mo. 1982).

As with Congress' initial decision in 1842 requiring single-member districts, there was no direct challenge to re-enactment of the requirement in 1967. However, just as this Court cited the 1842 statute as precedent for the election reforms of the 1870's, *Ex Parte Siebold, supra,* 110 U.S. 651, so too did this Court cite the 1967 re-enactment as precedential authority for the Voting Rights Act Amendment of 1970, which lowered the voting age to 18. *Oregon v. Mitchell, supra,* 400 U.S. 112 (1970). In his lead plurality opinion upholding Congress' power, Justice Black explained:

> "The breadth of power granted to Congress to make or alter election regulations in national elections . . . is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it ***intended to grant to Congress the power to lay out or alter the boundaries of congressional districts.*** . . . And in *Colegrove v. Green,* 328 U.S. 549 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.
>
> ***"Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate 'rotten boroughs,' and Congress has in fact used its power to prevent States from electing all Congressmen at large.*** There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the

polls and vote in all federal elections." *Id.* at 121-122; emphasis partially added.

Oregon was this Court's last occasion to address Art. I, § 4, and it was consistent with all of the Court's previous comments. For 150 years Congress has exercised its power pursuant to Art. I, § 4, to require election by single-member districts. For 100 years this Court has recognized Congress' power, citing it as authority for other election laws premised upon Art. I, § 4.

CONCLUSION

Interesting as this historical review is, and much as appellants would enjoy rearguing the debates of James Madison and Patrick Henry, nothing in this case warrants further attention by the Court. Analysis of over 200 years' worth of drafters' intent, Congressional implementation and judicial review merely returns us to Hamilton's basic premise:

> "A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws." *Oregon v. Mitchell, supra,* 400 U.S. at 123.

Article I, § 4, gives Congress plenary authority over the procedures to be followed in electing its members, including the power to require that elections be by single-member districts. The court below correctly concluded that "Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned." Appen. A at p. 17.

For the foregoing reasons, appellees respectfully submit that this challenge to 150 years of precedent is so unsubstantial as to need no further argument. The judgment of the District Court for the Northern District of California should be affirmed.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General of the State of California

FLOYD D. SHIMOMURA
Assistant Attorney General

LINDA A. CABATIC Supervising Deputy Attorney General

ALLEN SUMNER
Assistant Attorney General

Attorneys for Appellees California Governor Pete Wilson and Secretary of State March Fong Eu

DATED: December 3, 1992

APPENDIX A

UNITED STATES DISTRICT COURT*
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY A. DeWITT, PAMELA R. DeWITT-CARTER, DOROTHY S. BALDWIN, RENE A. RIVAS, Plaintiffs, v. THOMAS S. FOLEY, Speaker of the U.S. House of Representatives; PETE WILSON, Governor of the State of California; MARCH FONG EU, Secretary of State of the State of California, Defendants.	No. C-92-0510-CAL (Three Judge Court) OPINION AND JUDGMENT OF DISMISSAL (Filed AUG 31 1992)

Before NOONAN, Circuit Judge, LYNCH and LEGGE, District Judges.

LEGGE, District Judge:

I.

Defendants have moved to dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)3 and 12(b)6. The motion was opposed, heard and submitted for decision. The court has considered the moving and opposing papers, the record, the arguments, and the applicable authorities.

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*Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

The court concludes that plaintiffs' challenges to district elections are not supported by the United States Constitution, federal statutes, the California Constitution, California statutes, or case law. The court therefore concludes that the action should be dismissed.

II.

Title 28 U.S.C. § 2284(a) provides for a three-judge court "when an action is filed challenging the constitutionality of the apportionment of congressional districts." Defendants argue that plaintiffs are not entitled to this three-judge court because they are challenging the constitutionality of pre-established districts, rather than the allocation of representatives among those districts. Defendants cite *Members of California Congressional Delegation v. Eu*, 790 F.Supp. 925, 926 n.1 (N.D. Cal. 1992), for the proposition that "'reapportionment' describes the process of allocating representatives among pre-established districts."

The statute refers to "apportionment," not "reapportionment." Plaintiffs here challenge the fact of apportionment among districts, rather than the manner in which those districts have been drawn. This is sufficient to bring them within the ambit of the statute.

III.

Plaintiffs are three residents of California's seventh congressional district, and on resident of the state of Virginia. In the 1990 primary and general elections, the

California plaintiffs attempted to vote for candidates outside the seventh district by writing different district numbers on their ballots and writing in the names of candidates in those other districts. They allege that they want to associate with like-minded voters across the state to elect congressional representatives. The Virginia plaintiff wants to associate with like-minded Latino voters across *state* lines by voting in California's congressional elections.

The complaint attempts to allege seventeen claims for relief. The first through ninth and eleventh through fifteenth are that § 100 of the California Elections Code violates a number of provisions of the U.S. Constitution[1] and the federal Voting Rights Act, 42 U.S.C. § 1971 *et seq.* The tenth claim is that the creation of special minority districts, which was done in California under the Voting Rights Act, violates the Fourteenth, Nineteenth, and Twenty-Sixth Amendments. The sixteenth claim is that 2 U.S.C. § 2(c), Article XXI, § 1 of the California Constitution, and § 2500 of the California Elections Code, which require the establishment of single-member congressional districts, violate the same provisions of the U.S. Constitution and the Voting Rights Act. Finally, the seventeenth claim is that the recent redistricting by the California Supreme Court, which was considered by this court in *Congressional Delegation v. Eu, supra,* violated Article I, § 4 of the U.S. Constitution, because such redistricting must

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[1] Art. I, § 2, cl. 1, 2, and 3; Art. IV, § 4; and the First, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments.

be done by Congress or state legislature, and not by the courts.

The gravamen of these claims is that minority groups (whether by race, sex, age or political orientation) are unable to obtain representation in proportion to their numbers; because while they may have enough votes state-wide to elect a representative, they rarely constitute a majority within a congressional district. This allegedly perpetuates a House of Representatives composed of predominantly white male incumbents, in an increasingly heterogeneous society.

IV.

Plaintiffs' complaint concerns both federal and California law.

The U.S. Constitution contains the qualifications for voters and candidates for Congress. Article I, § 2, clause 1 of the United States Constitution sets forth the requirements for persons entitled to vote for representatives as follows (the "Voter Qualifications" clause):

> [T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Clause 2 of that same section sets forth the qualifications for representatives themselves (the "Candidate Qualifications" clause):

> No Person shall be a Representative who shall not have attained to the Age of twenty five years, and been seven Years a Citizen of the United States, and who shall not, when elected,

> be an Inhabitant of that State in which he shall be chosen.

The Constitution also empowers both Congress and the state legislatures to make rules governing the time, place and manner of holding these elections. Section 2 of the Fourteenth Amendment amended the third clause of Article I, § 2 (the "Apportionment" clause) to provide that

> Representatives shall be apportioned among the several States according to their respective numbers. . . .

Article I, § 4 provides that

> The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . .

Congress' authority here is paramount. Congress has enacted legislation requiring the states to establish single-member districts, 2 U.S.C. § 2(c). That statute requires each state entitled to more than one representative to:

> establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . .

California's Constitution also requires that the legislature establish, and that representatives by chosen from, single-member districts. Article XXI, § 1, is entitled "Reapportionment," and provides that after each decennial national census, "the Legislature shall adjust the

boundary lines of the . . . Congressional . . . districts." The districts shall be "reasonably equal" in population, and "[e]ach member of the . . . Congress shall be elected from a single-member district." *Id.* at § 1(b), 1 (a).

The California Elections Code also provides for single-member districts, and allows voters to vote only in the "territory" in which they reside. California elections Code § 25000(a) states that "[o]ne Representative [shall be elected to the Congress of the United States] for each congressional district." Section 100(a) provides that otherwise qualified persons "may vote at any election held within the territory within which he or she resides and the election is held." Neither § 100 nor its relatives purport to define "territory." Plaintiffs argue that this section imposes a voter residency requirement not found in any other constitutional or statutory provision.

V.

Defendants Governor Wilson and Secretary of State Eu move to dismiss the complaints, primarily on the ground that Article I, § 4 of the U.S. Constitution, which gives Congress the authority to prescribe the "times, places and manner" of holding elections for representatives, gives it the power to require that representatives be elected by district. Congress exercised that power in enacting 2 U.S.C. § 2(c), which is binding on the states. *Assembly v. Deukmejian*, 30 Cal.3d 638, 662; 180 Cal.Rptr. 297, 311 (1982) (2 U.S.C. § 2(c) "forbids the use of statewide elections to fill congressional seats").

A.

There are no cases squarely defining Congress' power under Article I, § 4 to require that representatives be elected by district. However this court concludes that this power is supported by case law and by documents which are part of the "legislative history" of that article.

As will be discussed below, Congress first exercised that constitutional power in 1842, requiring election by single member districts. In 1879 the U.S. Supreme Court assumed, without discussion, that this exercise of power was constitutional. Congress effectively repealed the requirement that representatives be elected from single member districts in 1929, and reenacted it in 1967. In 1970, a Justice of the Supreme Court concluded that "the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of Congressional districts." *Oregon v. Mitchell*, 400 U.S. 112, 121 (1970) (opinion of Black, J.).

B.

At the Constitutional Convention of 1787, the Committee of Detail proposed draft language similar to the final version of Article I, § 4:

> The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time be altered by the Legislature of the United States.

Madison, *Notes of Debates in the Federal Convention of 1787* (Ohio Univ. Press 1966) at 387.

Two delegates opposed giving Congress any power over such matters, contending that the states could and must be relied upon. Madison addressed the Convention:

> [T]he legislatures of the States ought not to have the uncontrolled right of regulating the times places and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. **Whether the electors should . . . be divided into districts or all meet at one place, should all vote for all the representatives; or all in a district vote for a number allotted to the district. . . .**

Id. at 423-24 (emphasis added).

Three other delegates agreed that Congress should have the ultimate authority over the time, place, and manner of choosing representatives, and the debate was at an end. The draft was adopted unanimously. *Id.* at 424-25. That is clear evidence that the power to prescribe the "places and manner" of elections, reposed in the first instance in the several States and ultimately in the Congress, includes the power to prescribe that they be held by district. *See Wesberry v. Sanders*, 376 U.S. 1, 33-34 (1964) (Harlan, J., dissenting) ("These remarks of Madison . . . [s]upported by others at the Convention, and not contradicted in any respect . . . indicate as clearly as may be that the Convention understood the state legislatures to have . . . the power to district well or badly, subject only to the supervisory power of Congress. . . . The

debates in the ratifying conventions, as clearly as Madison's statement . . . indicate that under § 4, the State legislatures, subject only to the ultimate control of Congress, could district as they chose").

This conclusion is bolstered by the U.S. Supreme Court's observation that:

> Madison in *The Federalist* described the system of division of States into congressional districts, the method which he and others assumed states probably would adopt: "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives."

Wesberry v. Sanders, 376 U.S. 1, 15 (1964) (quoting The Federalist, No. 57 (Cooke ed. 1961), at 389). *See also, The Federalist* No. 56 (dividing large states into districts promotes knowledge of local interests); *Oregon v. Mitchell*, 400 U.S. 112, 120 n.2 (1970) ("[The states legislatures] might make an unequal and partial division of the states into districts for the election of representatives. . . . Without these powers in congress, the people can have no remedy; but the 4th section provides a remedy" (quoting Mr. Parsons of the Massachusetts ratifying convention)).

It is true, as argued by plaintiffs, that six or seven of the conventions of the thirteen ratifying states proposed that Congress' power to modify the regulations adopted by the states be limited to situations where the states "shall neglect, or refuse or be unable" to make such regulations. *See* Cong. Globe, 27th Cong., 2d Sess., 465-66 (remarks of Sen. Wright). However, as the Supreme Court

has noted, "Such an amendment was never adopted." *Oregon v. Mitchell*, 400 U.S. at 119 n.2.[2]

After considering the history of Article I, § 4, Justice Black concluded that:

> the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers argued . . . that Congress would "most probably lay the state off into districts." And in *Colegrove v. Green*, 328 U.S. 549 (1946), no justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Oregon v. Mitchell, 400 U.S. 112, 121 (1970) (opinion of Black, J.).

C.

Congress did not exercise its power to require that states elect representatives by district until 1842. 5 Stats. 491. Congress' efforts in that regard were summarized by the Supreme Court in *Colegrove v. Green*, 328 U.S. 549 (1946):

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[2] Even among these states, New York observed that "nothing contained in the said Constitution is to be construed to prevent the *Legislature of any State* from passing laws . . . to divide such State into convenient districts, and to apportion its Representatives to and amongst such districts."
Remarks of Sen. Wright, *supra*, at p. 466 (emphasis added).

> Until 1842 there was the greatest diversity among the states in the manner of choosing Representatives because Congress had made no requirement for districting. Congress then provided for the election of Representatives by districts. Strangely enough, the power to do so was seriously questioned; it was still doubted by a Committee of Congress as late as 1901. In 1850 Congress dropped the requirement. The Reapportionment Act of 1862 required that the districts be of contiguous territory. In 1872 Congress added the requirement of substantial equality of inhabitants. This was reinforced in 1911. But the 1929 Act . . . dropped these requirements.

Id. at 555 (citations omitted). In *Wood v. Broom*, 287 U.S. 1 (1932), the Court held that Congress' omission of the compactness, contiguity, and equality of population requirements from the 1929 Act effectively repealed these requirements. *Id.* at 6-7. Congress took no further action to require election by single member districts until it passed the statute presently in force, 2 U.S.C. § 2(c), in 1967. 81 Stat. 581.

D.

This long and continuous interpretation of Congress' powers under Article I, § 4 is persuasive.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the Supreme Court stated:

> The practical construction of Article I, section 4, is impressive. General acquiescence cannot justify departure from the law, but long and

> continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political right and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no clear and definite support for a contrary construction as to justify disregard of the established practice in the States.

Id. at 369 (citations omitted).

Congress' exercise of its power to require elections by single-member districts over the past 150 years, coupled with the Supreme Court's tacit approval, in *Ex Parte Siebold,* 100 U.S. 371 (1879); *Ex Parte Yarbrough,* 110 U.S. 651 (1884); *United States v. Gradwell,* 243 U.S. 476 (1917);[3] *Smiley v. Holm; United States v. Classic,* 313 U.S. 299 (1941);[4] *Oregon v. Mitchell,* and *Buckley v. Vallejo,* 424 U.S.

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[3] "Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress or in adopting regulations which States have prescribed for that purpose has been settled by repeated decisions of this court." *Id.* at 482 (citations omitted).

[4] "[T]he states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under [the Necessary and Proper clause]." *Id.* at 315 (citations omitted).

1 (1976),[5] constitute a "long and continuous interpretation" that such action is constitutional.

We also note two recent decisions of the Court which have upheld congressional discretion, *U. S. Department of Commerce v. Montana*, ___ U.S. ___, 112 S.Ct. 1415 (1992), and state discretion, *Burdick v. Takushi*, ___ U.S. ___, 112 S.Ct. 2059 (1992) in voting rights limitations.

E.

Plaintiffs argue that whatever Congress' power under Article I, § 4, it cannot exercise that power in a way that alters the *qualifications* of candidates and voters. They contend that limiting voters to the districts in which they live imposes a "qualification" on them not authorized by the U. S. Constitution. As Alexander Hamilton stated in The Federalist, No. 60:

> [Congress'] authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are unalterable by the legislature.

(quoted with approval in *Powell v. McCormack*, 395 U.S. 486, 539 (1969) ("immutability of qualifications set forth in [Article I, § 2, cl. 2 of] the Constitution").

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[5] "The constitutional power of Congress to regulate federal elections is well established. . . . " *Id.* at 13 (citations omitted).

The *Powell* Court approved the decision of Congress in the 1807 election case of William McCreery of Maryland. Maryland had enacted a law requiring one of the two representatives from Baltimore County to be a resident of Baltimore City. Mr. McCreery was duly elected, but his residence was questioned. The House Committee of Elections recommended that he be seated, because it

> considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them. . . .

Powell, 395 U.S. at 542-43 (quoting 17 Annals of Cong. 872 (1807)).

The Committee concluded that the local residency requirement was an attempt by the state of Maryland to impose an *additional* qualification on members, and was therefore unconstitutional. 1 A. Hinds, *Precedents of the House of Representatives of the United States* § 414 (1907). However, even those who urged this position were of the opinion that:

> The States might establish districts, but they might not prescribe that Representatives should be confined to the districts.

Id. at p. 383.

Similarly, Article I, § 2, clause 1 of the Constitution prescribes the qualifications for *voters* in congressional contests in the states, which the states may not alter:

> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications of voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

Yarbrough, 110 U.S. at 663. And in *Oregon v. Mitchell*, 400 U.S. 112, (1970), Justice Black opined that:

> Surely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate "rotten boroughs," and Congress has in fact used its power to prevent States from electing all Congressmen at large.

Id. at 122 (opinion of Black, J.) (emphasis in original).

Plaintiffs argue the following analogy: just as imposing a residency requirement on candidates violates the candidate qualifications clause, imposing a residency requirement on voters violates the voter qualifications clause. So long as a candidate is a resident of the state, he or she may run for any seat in the state; so long as a voter resides in the state, he or she may vote for any candidate running in any congressional contest in the state. But plaintiffs' analogy is artificial and is not consistent with the language of Article I, Section 2.

The candidate qualifications clause states that "[n]o person shall be a Representative who shall not . . . when elected, be an Inhabitant of that State in which he shall be chosen." U.S. Const. Atr. I, Sec. 1, cl. 2. The clause prescribes a closed-universe of "qualificaitons" for representatives, which may not be added to, subtracted from, or altered. One of the "qualifications" enumerated is residency within the state.

The voter qualifications clause, on the other hand, states that representatives shall be chosen by electors who "shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature." U.S. Const. Art., I, Sec. 1, cl. 1. In California, that branch is the state Assembly, whose members are elected in single-member districts. Thus, if the geographic location of electors within a state were deemed a "qualification," voters could only vote for representatives by Assembly district, resulting in a congressional delegation either larger or smaller than that prescribed by Congress under Article 1, Sec. 2, cl. 3.

The requirement that voters reside within the congressional district in which they vote is therefore more properly understood as a restriction on the "place" or "manner" of election, which both Congress and the state legislature are empowered to prescribe.

This distinction is also implicitly recognized in California Elections Code § 100(a), challenged by plaintiffs, which provides that:

> Every person who *qualifies* under Section 2 of Article II of the Constitution . . . may vote at any

> election within the territory within which he or she resides.

(Emphasis added.) Article II, Section 2 of the California Constitution provides that "A United States citizen 18 years of age and resident in this state may vote." These are the only "qualifications" imposed on voters.

F.

Congress' authority to require that elections be held by single-member districts can no longer be seriously questioned. The "antiquated states-rights doctrine" relied upon by those who originally opposed Congress' exercise of this power has been discredited, as noted by the majority in *Parsons v. Sanders* [full cite]. And it is settled law that the Framers *intended* to give Congress and the states the power to draw congressional districts as a part of the "manner" of elections.

The states' power to regulate the "time, place and manner" of congressional elections within its borders is coextensive with that of Congress, although Congress' authority is paramount. The power is conferred by the same words, in the same section of the same instrument. Therefore, since 2 U.S.C. § 2(c) is constitutionally valid, so are the California constitutional and statutory provisions challenged by plaintiffs.

VI.

Plaintiffs argue that Article I, § 4 does not answer their claims based on subsequent amendments to the Constitution--the First, Tenth, Fourteenth, Fifteenth,

Nineteenth and Twenty-Sixth amendments, the violation of which is alleged in their fourth and sixth through thirteenth claims. Specifically, plaintiffs argue that district elections discriminate in favor of incumbent candidates in violation of the First Amendment, and that the establishment of special minority districts under the Voting Rights Act violates the prohibition against "separate but equal" in the Fourteenth and Fifteenth amendments, and articulated by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Plaintiffs argue that these subsequent amendments "trump" whatever power was conferred by Article I, § 4, and that Article I power cannot be exercised inconsistently with those amendments. In view of the authorities cited above in section V above, we need discuss only two specific claims made by plaintiffs.

Plaintiffs' fourth claim is that the residency requirement violates the one-person, one-vote principle of the Voter Qualifications clause and the Equal Protection clause of the Fourteenth Amendment, because of the "physical impossibility of ensuring" that the districts will contain "exactly equal numbers of people." However, the U. S. Supreme Court recently reaffirmed the holding of *Wesberry v. Sanders*, 376 U.S. 1 (1964) that those provisions only require states to "make a good-faith effort to achieve precise mathematical equality." *United States Dept. Commerce v. Montana*, 112 S.Ct. 1415, 1418 (1992) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)). Exact equality is not required.

Plaintiffs' ninth claim is that the residency requirements result in winner-take-all contests that "deprive racial minority groups of even the opportunity to obtain

representation in proportion to their voting strength," in violation of the Voting Rights Act, 42 U.S.C. § 1971 *et seq.* The basic objective of the Voting Rights Act is to protect minority voting opportunities, which objective has been pursued in the reapportionment of California's congressional districts. Even if that objective were not, as plaintiffs allege, fully accomplished, a later statute cannot "trump" the original provisions of the Constitution. The Constitution must be superior.

District elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference.

VII.

Certain additional arguments of the parties need be answered only briefly.

Plaintiffs' seventeenth claim is that the California Supreme Court had no authority to draw congressional districts, and that "[i]f the people and their elected representatives fail to establish congressional districts desired, but not established, by Congress, Congress's remedy under the elections clause lies not in the courts but in itself." However, there is a long history of court participation in redistricting when the elected branches do not do so. *See* authorities cited in *Members of California Congressional Delegation v. Eu*, 790 F.Supp. 925 (N.D. Cal. 1992).

Defendants argue that venue in this district is improper and that plaintiffs are guilty of laches. In view of the conclusions which this court reaches above, no

further consideration of these arguments is necessary. For the same reasons, the motions which have been filed by plaintiffs and by defendant Thomas S. Foley after the submission of this motion to dismiss are denied.

IT IS THEREFORE ORDERED that defendants' motion is granted and the action is dismissed. Because the infirmities of the complaint are matters of law and could not be corrected by amendment, the dismissal is without leave to amend. A judgment of dismissal is hereby entered.

Dated: August 31, 1992.

/s/ Charles A. Legge
CHARLES A. LEGGE
UNITED STATES
DISTRICT JUDGE

/s/ John T. Noonan, Jr.
JOHN T. NOONAN, JR.
CIRCUIT JUDGE

/s/ Eugene F. Lynch
EUGENE F. LYNCH
UNITED STATES
DISTRICT JUDGE

APPENDIX B

DANIEL E. LUNGREN, Attorney General
of the State of California
LINDA A. CABATIC, State Bar No. 87483
Supervising Deputy Attorney General
ALLEN H. SUMNER, State Bar No. 72862
Assistant Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5468

Attorneys for State Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY A. DEWITT, et al., Plaintiffs, v. THOMAS S. FOLEY, et al., Defendants.	NO. C-92-0510-CAL THREE JUDGE COURT NOTICE OF MOTION TO DISMISS FOR FAILURE FOR IMPROPER VENUE, LACHES AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (FRCP 12 (B)(3) AND (6) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: April 24, 1992 Time: 9:30 a.m. Courtroom: 10 (Filed March 16, 1992)

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DANIEL E. LUNGREN, Attorney General
of the State of California
LINDA A. CABATIC, State Bar No. 87483
Supervising Deputy Attorney General
ALLEN H. SUMNER, State Bar No. 72862
Assistant Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5468

Attorneys for State Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY A. DEWITT, et al., Plaintiffs, v. THOMAS S. FOLEY, et al, Defendants.	NO. C-92-0510-CAL **THREE JUDGE COURT** **NOTICE OF MOTION TO DISMISS FOR FAILURE FOR IMPROPER VENUE, LACHES AND FAILURE TQ STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (FRCP 12(B)(3) AND (6) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF.** **Date: April 24, 1992** **Time: 9:30 a.m.** **Courtroom: 10**

TO TIMOTHY A DEWITT, PAMELA R. DEWITT-CARTER, DOROTHY S. BALDWIN, and RENEE A. RIVAS, Plaintiffs and TIMOTHY A DEWITT and ARLO HALE SMITH, their attorneys of record:

PLEASE TAKE NOTICE that on April 24, 1992, at 9:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, defendants in this action, Pete Wilson, Governor of the State of California, and March Fong Eu, Secretary of State, will move, and hereby move, this court to dismiss this action pursuant to FRCP 12(b)(3) and (6) because plaintiffs' have filed their complaint in an improper venue, the complaint is barred by laches, and the complaint fails to state a claim upon which relief can be granted.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed concurrently herewith, the pleadings and papers filed herein, and the record in this matter.

DATED: March13, 1992.

DANIEL E. LUNGREN
Attorney General of the State of California

LINDA A. CABATIC
Supervising Deputy Attorney General

Illegible
ALLEN SUMNER
Assistant Attorney General

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

Defendants' motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(3) and (6) presents three issues to be decided:

(1) Is Congress' direction in 2 United States Code section 2c that Representatives be elected in single-member districts an appropriate exercise of Congress' authority under article 1, section 4 of the Constitution prescribing the "times, places and manner of holding elections" for its Members?

(2) Have plaintiffs brought this action in the proper venue?

(3) Should plaintiffs' action be dismissed based upon the doctrine of laches?

PRELIMINARY STATEMENT OF THE CASE

Plaintiffs challenge the redistricting for California's 52 congressional Representatives recently ordered by the California Supreme Court. *Wilson v. Eu*, 1 Cal.4th 707 (1992).[1] Specifically, plaintiffs attack the plan's basic premise of allocating the state's Representatives into 52

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[1] The Court accepted and adopted, as modified, redistricting plans proposed by three special Masters appointed four months earlier in light of the failure of the Governor and Legislature to adopt plans for the 1992 Primary and General Elections. *Wilson v. Eu* (1991) 54 Cal.3d 471. We note that this court recently dismissed another challenge to the California Supreme Court's order. *California Democratic Congressional Delegation v. Eu*, ___ F. Supp. ___ [No. C-91-3383 FMS] (N.D. Cal. March 3, 1992).

single-member districts. Instead, plaintiffs assert that California's entire congressional delegation should be elected at-large.

The role in this case of defendants Pet Wilson, Governor of the State of California, and March Fong Eu, Secretary of State is "formalistic," arising solely from their responsibility to apply the districts adopted by the California Supreme Court and conduct elections using those districts. *California Democratic Congressional Delegation v. Eu, supra,* slip, opn. at p. 5; Cal. Const., art. V, § 1; and Cal. Elec. Code § 55.

Plaintiffs present their challenge by way of nine separate claims. However, the gravamen of the claims – individually and collectively – rests upon the question as to whether or not Congress acted within its authority when it enacted 2 United States Code section 2c, requiring election of Representatives by district. Section 2c, enacted in 1967, provides in relevant part:

> "In each state entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . . "

This provision was adopted by Congress pursuant to article I, section 4, clause 1, of the United States Constitution:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by

> law make or alter such regulations, except as to the places of choosing Senators."

In fashioning its plan, the California Supreme Court was "guided by," inter alia, federal law, article XXI, section 1 of the California Constitution,[2] and the standards established by that Court's previous redistricting decisions. *Wilson v. Eu, supra,* 54 Cal.3d at 473. Those decisions had expressly cited Congress' mandate of single-member districts as binding upon the State of California. *Legislature v. Reinecke,* 6 Cal.3d 595, 603 (1972).[3]

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[2] Article XXI, section 1(a) of the California Constitution reads in relevant part: "Each member of . . . Congress . . . shall be elected from a single-member district."

This provision is implemented by California Elections Code section 25000, which provides in relevant part:

> "At each general election there shall be elected to Congress of the United States: (a) One Representative for each congressional district. . . . "

[3] In creating the congressional districts challenged by plaintiffs, the Masters were primarily guided by the United States Supreme Court's directions in *Karcher v. Daggett,* 462 U.S. 725 (1983). *Wilson v. Eu, supra,* 1 Cal. 4th at 717. *Karcher,* in turn, directs:

> "Article I, § 2, establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.' *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the 'equal representation' standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality 'as nearly as is practicable.' " (*Id.* at 730; emphasis added.)

Defendants submit that section 2c is a valid exercise of Congress' power to determine the "times, places and manner" of congressional elections, and therefore binding upon them. U.S. Const., art. VI, § 2; Cal. Const., art. III, § 1. Thus since defendants are bound by both federal and state law, plaintiffs' complaint fails to state a claim upon which relief can be granted. Additionally, plaintiffs' action should be dismissed on the grounds of laches. Finally, plaintiffs have selected an improper venue in which to bring their action.

ARGUMENT

I.

PLAINTIFFS HAVE SELECTED THE IMPROPER VENUE

Plaintiffs allege that venue lies in the Northern District of California pursuant to 28 United States Code Section 1391(b)(2) because a substantial part of the acts complained of occurred in this district. However, defendants maintain their offices and perform their duties relating to elections in the City of Sacramento, the capital of the State of California. (Cal. Gov. Code, § 1060.) Any claim based upon defendants' election duties occurred, and must be heard, where those duties are performed. *Shayer v. Kirkpatrick,* 541 F.Supp. 922, 925 (W.D. Mo. 1982). Accordingly, this action should be transferred to the Eastern District of California.

II.

PLAINTIFFS' ACTION SHOULD BE DISMISSED ON THE GROUNDS OF LACHES

This court recently dismissed a challenge to the redistricting plan at issue here on the grounds of abstention. *California Democratic Congressional Delegation v. Eu, supra,* ___ F.Supp. ___ [C-91-3383 FMS]. Specifically, the court ruled that under application of *Younger v. Harris,* 401 U.S. 37 (1971) and *Middlesex County v. Garden State Bar Assoc.,* 457 U.S. 423 (1982), it was required to abstain, as a balance of constitutional federalism, to the previously-filed proceeding before the California Supreme Court, *Wilson v. Eu. supra,* 1 Cal.4th 707. The court noted that the parties in *California Democratic Congressional Delegation* had raised their contentions under the United States Constitution and the Voting Rights Act in the proceedings before both the California Supreme Court and its masters. Slip opn. at –17.

In contrast, plaintiffs here delayed the filing of this action or any other action, until after the California Supreme Court had issued its order adopting the Masters' redistricting plan.[4] Plaintiffs were well aware of the

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[4] Since September of 1991, plaintiffs were on notice that the congressional plan would require single-member districts. The Masters held six days of public hearings in Sacramento, San Francisco, San Diego and Los Angeles. *Wilson v. Eu, supra,* 1 Cal.4th at 713. Oral and written testimony was received on a variety of topics, as well as 22 separate plans proffered by various interests. *Id.* at 742. The Masters stated that "we were uniformly impressed by the sense of responsibility and goodwill exhibited by these witnesses and their belief that the Masters would attempt to address their concerns, fairly and equitably." (*Id.* at 743.)

fact that following the 1990 census, the State was mandated to adjust the boundary lines of its voting districts for representatives to Congress by the federal constitution and state constitution. (*Id.* at p. 2.) Yet, they did nothing to prevent that from occurring, until it was too late.

Additionally, the Masters reviewed transcripts of 12 public hearings held by the California Senate from December 1990 to September 1991 on legislative and congressional redistricting. (*Id.* at 742.) Plaintiffs failed to participate in these hearings either. The summary of these hearings from California Senate Committee on Elections and Reapportionment is attached as Exhibit A. Defendants request that the court take judicial notice of the California Legislature's report pursuant to rule 201 of the Federal Rules of Evidence.

Following presentation of the Masters' Report, the California Supreme Court itself then accepted additional written comments and amici curiae briefs from any interested party on the districts proposed in the report. (*Id.* at 720.) Again, there was no comment from plaintiffs.

Plaintiffs thus had ample notice that California intended to comply with Congress' mandate of single-member districts in developing the State's redistricting plan and failed to do anything to preserve their interests. The California Legislature and the Supreme Court's Masters conducted numerous public hearings around the state from December of 1990 through December of 1991, accepting oral or written testimony from all interested parties. Once the Masters' report was released, the California Supreme Court itself accepted direct comment from any interested party. "We have no doubt that the state proceedings here provided the required due process for the adjudication of the federal issues." *California Democratic Congressional Delegation v. Eu, supra,* slip. opn. at 17.

Yet nowhere in this process of public hearings and comment did plaintiffs every once raise any objection to the developing plan of election by single-member district. Rather, plaintiffs waited until the California Supreme Court had adopted the redistricting plan before filing the present action.

Accordingly, their action praying for equitable relief setting aside the California Supreme Court's order should be dismissed on the grounds of laches.

Laches is an equitable defense, *Citizens, Etc. v. Secretary, U.S. Dept. of Energy,* 683 F.2d 1171, 1174 (8th Cir. 1982), consisting of two elements: (1) inexcusable delay in instituting suit, and (2) prejudice resulting to the defendant from such delay. *Gruca v. United States Steel Corporation,* 495 F.2d 1252, 1258 (3rd Cir. 1974). Relief is addressed to the sound discretion of the trial court. *Ibid.*

Here, on September 6, 1991, defendant Wilson filed a petition with the California Supreme Court, alleging the failure of the State Legislature process to produce a redistricting plan following the 1990 census and requesting the California Supreme Court to assume jurisdiction. (*Id.* at p. 3.) Plaintiffs did nothing to prevent this from occurring. Here, Congress has required election by district since 1967. 81 Stat. 581. Pursuant to Congress' directive, and the implementing provisions of state law, in September of 1991 the California Supreme Court instructed its Masters to prepare recommendations for, inter alia, " . . . 52 single-member congressional district. . . . " *Wilson v. Eu, supra,* 54 Cal.3d at 473. Moreover, as a result of plaintiffs' inexcusable delay, defendants have been prejudiced.

This court has already recognized that "speed was important" in resolving California's redistricting because defendant Secretary of State could not hold the June 1992 elections "unless all judicial decisions on redistricting were completed by the end of January." *California Democratic Congressional Delegation v. Eu, supra,* slip. opn. at p. 7. But here, plaintiffs did not even file their action until

January 29, 1992. Additionally, the California Supreme Court has specifically declared that the relief plaintiffs seek – elections at-large – would tremendously increase the burdens and expenses of effective campaigning" and "seriously impede the casting of uniformed ballots." *Legislature v. Reinecke*, (1972), *supra*, 6 Cal.3d at 603.

Plaintiffs' delay in filing this suit, seeking elections at-large of the 52-member congressional delegation would thus prejudice not only the named defendants who must conduct the election, but also all candidates for Congress and California's entire electorate. Accordingly, the court should exercise its discretion to dismiss plaintiffs' actions based upon laches:

> "In determining whether the doctrine of laches should bar a lawsuit, all the particular circumstances of each case must be considered, including the length of delay, the reasons for it, its effect on the defendant, and the overall fairness of permitting the plaintiff to assert his or her action." *Citizens, Etc. v. Secretary, U.S. Dept. of Energy, supra*, 683 F.2d at 1174.

III.

CONGRESS HAS AUTHORITY TO REQUIRE REPRESENTATIVES BE ELECTED BY DISTRICT

This case turns entirely upon construction of article, I, section 4, clause 1, of the United States Constitution. Specifically, does Congress' authority to prescribe the "times, places and manner" of elections for its Members give it the power to require election by district?

While defendant find no decision specifically addressing this question, the legislative history of article I, section 4, Congress' long exercise of its powers thereunder, and the recognition by the United States Supreme Court of Congress' actions for more than 150 years, all evince the clear intent, understanding and recognition that Congress does in fact have the authority to require Representatives to be elected by district.

A. The Founders Intended For Congress To Ensure That Representatives Be Elected By District

Alexander Hamilton, in *The Federalist*, termed article I, section 4, the most "completely defensible" provision of the entire Constitution: "Its propriety rests upon the evidence of this plain proposition, that **every government ought to contain in itself the means of its own preservation.**" (*The Federalist*, No. 59 (Mentor 1961), at p. 362; emphasis in original). From initial conception through final ratification, those who debated, drafted, supported and opposed the Constitution all recognized that it gave Congress the power to require Representatives to be elected by district.

James Madison's *Notes of Debates in the Federal Convention of 1787* chronicle that once the Great Compromise had been achieved, whereby the Senate would be elected by and represent the States and the House elected by and represent the People, the Federal Convention still had to determine the specifics of how the House should be elected. One view, advanced by George Mason and James Wilson of Virginia, was for direct " . . . election by the people in large districts which would be most likely to

obtain men of intelligence and uprightness; subdividing the **districts** only for the accommodation of voters." (Madison, *Notes of Debates in the Federal Convention of 1787* (Norton 1987), at p. 85; emphasis added.) Others, such as Elbridge Gerry of Massachusetts and Roger Sherman of Connecticut, " . . . opposed elections by the people in **districts**, as not likely to produce such fit men as elections by the State Legislatures." (Notes, *supra*, at p. 86; emphasis added.) Ultimately, it was concluded that the States had been given adequate deference through their selection of Senators; Representatives were to be elected directly by the People.

The Committee of Detail then submitted draft lan guage to the Convention very similar to the final wording of the present article I, section 4:

> "The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time be altered by the legislature of the United States." (*Notes, supra* at p. 387.)

This language was amended to limit Congress' power over State legislatures in their selection of Senators. (*Id.* at 423.)

Charles Pickney and John Rutledge of South Carolina then proposed amendments to remove Congress' power over elections altogether. "The States they contended could and must be relied on in such cases." (*Ibid.*)

Madison himself led the fight to maintain Congress' authority:

"The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode. This view of the question seems to decide that the Legislature of the States ought not to have the uncontrolled right of regulating the times, places and manner of holding elections. **These were words of great latitude.** It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, **should all vote for all the representatives; or all in a district vote for a number allotted to the district;** these and many other points would depend on the Legislatures, and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. . . . What danger could there be in giving a controlling power to the National Legislature? Of whom was it to consist?" (*Ibid*; empahsis added.)

Pickney's amendments failed. The Constitution which the Convention presented to the States for ratification contained article I, section 4, in its present form, giving Congress the "great latitude" fought for by Mason. Congress would have the power to determine, among other things, whether Representatives shall be elected by district.

With completion of the Convention's drafting, attention shifted to the debates. Ironically, much of the opponents' attack against article I, section 4, raised the fear that Congress would abuse its power by requiring the very at-large election of Representatives which plaintiffs pray for:

> "The proposed Congress may make the whole state one district, and direct, that the capital (the city of New York, for instance) shall be the place for holding the election . . . They may declare that those members who have the greatest number of votes, shall be considered as duly elected; the consequence would be that the people, who are dispersed in the interior parts of the state, would give their votes for a variety of candidates, while any order, or profession, residing in the populous places, by uniting their interests, might procure whom they pleased to be chosen – and by this means the representatives of the states may be elected by one-tenth part of the people who actually vote." ("Brutus" Essay IV, to the People of the State of New York, November 29, 1787, *The Anti-Federalist Papers* (Ketcham ed. 1986) at p. 329.

See also "Speech of Patrick Henry to the Virginia Ratifying Convention," June 7, 1788 (*id.* at 215); "Centinel" No. I to the Freemen of Pennsylvania, October 5, 1787 (*Id.* at p. 235); and "Cato" Letter VII to the Citizens of the State of New York, January 3, 1788 (*id.* at p. 323).

The opponents demanded that Congress' power to regulate election of Representatives be totally eliminated, "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents." December 18, 1787, (*id.* at 240), or at least be limited to

instances " . . . when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same." "Additions Proposed By the Virginia Convention: A Proposed Bill of Rights," June 27, 1788 (*id.* at 224).

The Federalists, of course, defended Congress' power. Hamilton maintained that article I, section 4, provided essential "discretion power" over elections allowing Congress to modify procedures as necessary to meet any "change in the situation of the country." *The Federalist*, No. 59, *supra* at p. 363.

Madison in turn described the division of States into congressional districts, the method which he and others assumed would be adopted.[5] "The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives." *The Federalist* No. 57, *supra* at p. 355; emphasis added. He believed this approach would assure that each Representative was acquainted with the interests of his own constituents, and that the House collectively would have the necessary breadth of knowledge: "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either which would not be within the knowledge of the representative of the district." *The Federalist* No. 56, *supra* at 347; emphasis added.

Congress' power under article I, section 4, was also cited as a check against abuses by State legislatures. As

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[5] *See Wesberry v. Sanders*, 376 U.S. 1, 15 (1963).

Mr. Parsons, delegate to the Massachusetts convention, explained:

> "They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." 2 J.Elliot's *Debates on the Federal Constitution* 27 (1876); *Oregon v. Mitchell*, 400 U.S. 112, 120 (1970).

The Constitution was, of course, eventually ratified with the language of article I, section 4, unchanged.

The evolution of article I, section 4, as well as the supporting and opposing arguments, demonstrate that Congress' authority to prescribe the "times, places and manner" of electing Representatives included, and still includes, the power to require election by district. Indeed, election by district was at the center of all debates: Should election by district be direct or indirect through the State legislatures? Should the power to set districts be given to the States or to Congress? And, would Congress abuse its power by imposing elections at-large instead of by district? One constant throughout the debates was the fact that article I, section 4, gave Congress the power to require election by district.

B. Congress Has Exercised Its Power To Require District Elections For 150 Years Without Challenge

For the first 50 years following ratification of the Constitution Congress took no action, resulting in great diversity among the States in the manner of choosing Representatives. *Colegrove v. Green*, 328 U.S. 549, 555 (1945). Some states elected all of their Representatives on a single state ticket. *United States v. Gradwell*, 243 U.S. 476, 482 (1916). Then in 1842 Congress enacted its first law requiring election of Representatives by single-member districts. Act of June 25, 1844, § 2, 5 Stat. 491; *Whitcomb v. Chavis*, 403 U.S. 124, 158, n. 39 (1970); *Colegrove v. Green*, *supra*, 243 U.S. at 555 (1945); *United States v. Gradwell*, *supra*, 243 U.S. at 482.

Congress acted to eliminate what was then known as the "general ticket system," whereby every elector voted for as many names as the State was entitled to Representatives in Congress. Congress concluded that the general ticket system worked an injustice to other States which did not use it, and within States using the system gave undue power to the majority political party by submerging minority voters.[6] *Whitcomb v. Chavis*, *supra*, 403 U.S. at

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[6] Representative Campbell, sponsor of the act, explained that "(I)n this, the popular branch of the Legislature, the true principle of the Constitution was, that minorities as well as majorities should be represented; but where the general ticket system prevailed, the voice of the minority was suppressed. Mr. Q's motive in contending for this amendment, was a desire to preserve the influence of the small States. Georgia, New Jersey, and Alabama, now elected by general ticket; comparatively small numbers of Representatives, yet, on all party questions,

157, fn. 13; *Ex Parte Yarbrough*, 110 U.S. 651, 660 (1883). Earlier commentators explained that Congress' move to single-member districts:

> "Was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, through approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 Kent, *Commentaries* (12th ed. 1873) 230-231, n. (c).; *Colegrove v. Green, supra*, 328 U.S. at 553.

Modern observers have simply said that Congress' action in 1842 "signalled its belief that Representatives should

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they had a stronger voice than the largest states, who went on the district plan. While New Jersey, in such a case, made her voice tell as six, the voice of New York, numerous as was her delegation, told but as two. The large States, feeling this, would soon resort to the plan of a general ticket; and then what became of the influence of the small States? They must be lost, and swallowed up. Should New York, for example, resort to that system, though her population might be so equally divided that one party exceeded the other but by a single man, the preponderance of that one man would give to the State forty votes on that floor in favor of his side of the question; a power equal to one sixth of all the rest of the Union. On all the questions peculiar to Southern interests, the Northern States, owing to the district system, were now divided. While the Southern voted in solid phalanx; but let the general ticket prevail, and they would overwhelm the South. He had once doubted the constitutionality of the amendment; but, on fuller examination, his doubts had been removed – the constitutional objection was wholly technical." 11 Cong. Globe 445 (April 26, 1842); 27th Cong. 2d Sess. 1842.

be representative." *Montano v. Lefkowitz*, 575 F.2d 378, 385 (2nd Cir. 1978).

There was no challenge to Congress' decision in 1842 requiring election by single-member districts. However, 35 years later the United States Supreme Court did comment upon Congress' action in a series of cases during the 1870's and 1880's dealing with election reforms enacted following the Civil War.

Culminating in the United States Statutes of 1873-74, "Crimes Against the Elective Franchise and Civil Rights of Citizens," Rev. Stats., §§ 5506 to 5532, Congress enacted a number of election reforms to protect the newly-freed black voters and implement the Fourteenth and Fifteenth Amendments. These provisions addressed abuses such as false registration, bribery, false returns and neglect of election duties by state and local officials. *United States v. Gradwell, supra*, 243 U.S. at 483. The United States Supreme Court sustained enactment of these laws as within Congress' authority to prescribe the "times, places and manner" of elections pursuant to article I, section 4. The Court specifically cited as precedent Congress' action 35 years' earlier requiring single-member districts.

In *Ex Parte Siebold*, 100 U.S. 371 (1879), several election judges who had been convicted of violating the new voting procedures challenged Congress' authority to enact such laws. The Court upheld Congress' action, explaining:

> "Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts;

> and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. **No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.**" (*Id.* at 384; emphasis added.)

The Court characterized Congress' power under article I, section 4, as "plenary" (*Id.* at p. 388), stating: "The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent which it deems expedient. . . . " (*Id.* at p. 392) Following and citing *Ex Parte Siebold,* the Court in *Ex Parte Yarbrough, supra,* 110 U.S. 651, upheld other convictions under the Civil War election reforms. Again, the Court cited article I, section 4, and the action of Congress' in 1842, requiring single-member districts:

> "But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons." (*Id.* p. 662)

Thus, by the 1870's the validity of Congress' action in 1842 requiring single-member districts was unquestioned and the Court dismissed the idea anyone would pretend "at the present day" that Congress had exceeded its authority 35 years before.

The requirement of single-member districts continued, with minor interruption, from 1842 until 1929. *Colegrove v. Green, supra,* 328 U.S. at 555. Then, in the Act of June 18, 1929, Congress omitted the requirement that

districts be compact, contiguous and equal in population as to the new districts created under the Fifteenth Census. 46 Stat. 21, ch. 28. Although Congress did not expressly repeal the previous single-member district requirement of the Act of 1911, the Court ruled that this was the intent and result of Congress' action in 1929. *Wood v. Broom*, 287 U.S. 1 (1932).

Elimination of single-member districts of equal population inevitably led to disparity and malapportionment between districts.[7] By 1963, some districts contained two to three times the population of others, forcing the Court to intervene and require equal representation. *Wesberry v. Sanders, supra*, 376 U.S. 1. Although the authority of Congress pursuant to article I, section 4, was not directly at issue in *Wesberry*, it was discussed at length by both the majority and dissent.

The majority cited the Founders' debates as clear intent that Congress was to have the power to assure equal representation:

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[7] Courts addressing redistricting plans during the hiatus in federal legislation requiring single-member districts acknowledged that election by district was "desirable," "historically contemplated by the framers of the Constitution," *Norton v. Campbell*, 359 F.2d 608, 611-612 (10th Cir. 1966), and "the better practice." *Exon v. Tiemann*, 279 F.Supp. 603, 605 (D. Neb. 1967). States, of course, were free to adopt election by district, *Norton* at page 611, but federal courts could not order it:

> "It would be improper for this court to order the Legislature to provide for election by districts in the absence of an Act of Congress so requiring. . . ." *Exon, supra*, at p. 605; emphasis added.

> "Congress' power, said John Steele at the North Carolina convention, was not to be used to allow Congress to create rotten boroughs; in answer to another delegate's suggestion that Congress might use its power to favor people living near the seacoast, Steele said that Congress 'most probably' would **'lay the State off into districts'** and if it made laws 'inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them' " (*Wesberry, supra,* at 16; emphasis added.)

The majority did not question Congress' authority to require election by districts as one means to guarantee equal representation. Rather, the issue in *Wesberry* was the Court's role given Congress' failure to act.

Justice Hanlan, in his dissent, argued that the authority of Congress under article I, section 4, was the very reason the Court should not act: "There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power" (*id.* at 30). Justice Hanlan cited the same words by the Founders:

> "The debates in the ratifying conventions, as clearly as Madison's statement at the Philadelphia Convention [cite] indicate that under § 4, the State legislatures, subject only to the ultimate control of Congress, could district as they chose" (*id.* at 34).

Disagreeing as to what role the Court should play, both the majority and dissent recognized that Congress had plenary authority under article I, section 4, to compel election by districts.

Four years after *Wesberry,* Congress re-enacted the requirement of election by single-member districts in

1967 via the present 2 United States Code section 2c. 81 Stat. 581. Courts have characterized Congress' debate in 1967 as "echoing the views of their predecessors of 1842 with respect to the representative nature of representatives," *Montano v. Lefkowitz, supra,* 575 F.2d at 385, and having "made clear their distaste for at-large elections." *Shayer v. Kirkpatrick, supra,* 541 F.Supp. at 927.

Senator Howard Baker, one of the sponsors, explained on the Senate Floor, that single-member districts afford "maximum protection of the rights of all people and maximum responsiveness to their needs," 113 Cong. Rec. 34365-66 (Nov. 30, 1967). He noted, "The concept of single-member districts for a unique and special reason has been a nonpartisan undertaking by Members on both sides of the aisle.[8] *Ibid.*

As with Congress' initial decision in 1842 requiring single-member districts, there was no direct challenge to re-enactment of single-member districts in 1967. However, just as the United States Supreme Court cited Congress' action in 1842 as precedent for the later election reforms of the 1870's. *Ex Parte Siebold, supra,* 110 U.S. 651, so too did the Court cite re-enactment of single-districts in 1967 as precedential authority for the Voting Rights Act Amendments of 1970. Pub. L. 91-285, 84 Stat. 314.

The issue in *Oregon v. Mitchell, supra,* 400 U.S. 112, was Congress' authority, pursuant to article I, section 4,

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[8] "The passages from the floor debate . . . indicate opposition to at-large elections, rather than opposition to at-large elections prompted by *Wesberry.*" *Shayer v. Kirkpatrick,* (1982) *supra,* 541 F.Supp. at 927.

to lower the voting age to 18. In his lead plurality opinion upholding Congress' power, Justice Black explained:

> "The breadth of power-granted to Congress to make or to alter election regulations in national elections . . . is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it **intended to grant to Congress the power to lay out or alter the boundaries of congressional districts** . . . and in *Colegrove v. Green*, 328 U.S. 549 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.
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> "Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts . . . There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal actions." (*Id.* at 121-122; emphasis added.)

Oregon was the Court's last occasion to address article I, section 4, and it was consistent with all of the Court's previous comments. For 150 years Congress has exercised its power pursuant to article I, section 4, to require election of Representatives by district. For 100 years the Court has cited Congress' enactment of district voting as precedent for other election laws premised upon article I, section 4.

C. **Elections At-Large Are Disfavored**

Courts have long disfavored at-large elections, citing the same factors which moved Congress to require single-member districts: winner-take-all elections submerge minorities by overrepresenting the winning party, *Whitcomb v. Chavis, supra,* 403 U.S. at 159; a preference for reflecting community interests as closely as possible, *ibid;* long and cumbersome ballots making intelligent choices difficult, *Lucas v. Colorado Gen. Assembly,* 377 U.S. 713, 731 (1963); residents have no representative specifically responsible to them, *ibid;* and block voting by residents in multi-member districts results in undue representation relative to voters in single-member districts. *Chapman v. Meier,* 420 U.S. 1, 16 (1974); *see also Thornburg v. Gingles,* 478 U.S. 30, fn. 13 (1985). These problems would increase in a state the size of California:

> "[to] conduct statewide elections to fill . . . congressional seats in a state of California's geographical size and large population would not only tremendously increase the burdens and expenses of effective campaigning but, by increasing the choices confronting the electors . . . would seriously impede the casting of informed ballots." *Legislature v. Reinecke, supra,* 6 Cal.3d at 603; *Assembly v. Deukmejian,* 30 Cal.3d 638, 664 (1982).

This long-standing preference for single-member elections has now been incorporated into the Court's constitutional guidelines for apportioning congressional seats:

> " . . . the command of Art. I, § 2, that States create congressional districts which provide

> equal representation for equal numbers of people permits only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick v. Preisler* (1968), *supra*, 394 U.S. at 531 (emphasis added); *Wells v. Rockefeller* (1968) 394 U.S. 542, 546; and *White v. Weiser* (1973), *supra* 412 U.S. at 790.

And Congress may, pursuant to its authority under to article I, section 5, for judging qualifications of its own members, reject a delegation of Representatives-at-large. *Colegrove v. Green* (1945), *supra* 328 U.S. at 553.

Finally, for the same reasons that congressional elections must be by single-member districts, primary elections to select the nominees must also be by single-member district:

> "If could not be seriously contended that a primary to chose nominees for the various congressional districts in a general election could validly be held on a statewide basis or, when a country contains several congressional districts, even on a countywide basis, with the victors assigned to the districts in some arbitrary fashion which might result . . . in the nominee's being unresponsive to the desires of the voters in the district." (*Montano v. Lefkowitz* (1978), *supra*, 575 F.2d at 385.)

As to election of state legislatures, the Court has expressed the same disfavor for at-large elections. At-large elections are not unconstitutional per se under the Fourteenth and Fifteenth Amendments. *Thornburg v. Gingles, supra*, 478 U.S. at 48. However, single-member districts are "preferable," *Connor v. Williams*, 402 U.S. 690,

692 (1970), and federal courts required to fashion state reapportionment plans are directed to use single-member districts "absent insurmountable difficulties." *Chapman v. Meier, supra.* 420 U.S. at 18.

D. The Court Should Honor Congress' Determinations Pursuant To Article I. section 4

Again, Alexander Hamilton characterized Congress' authority under article I, section 4, as one of the most fundamental provisions of the entire Constitution – the means of Congress' own preservation. State courts are bound by Congress' determinations under this provision. *Assembly v. Deukmejian, supra* 30 Cal.3d at 662; *Simpson v. Mahan,* 185 S.E.2d 47, 212 Va. 416 (1972). So too have federal courts honored the historic exercise by Congress of a power essential to the very existence of that co-equal branch. Some 60 years ago the Court admonished:

> "The practical construction of Article I, section 4, is impressive. General Acquiescence cannot justify departure from the law, **but long and continuous interpretation** in the course of official action under the law may aid in removing doubts as to its meaning. **This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny."** *Smiley v. Holm,* 285 U.S. 355, 369, (1931).

Has there been "long and continuous" interpretation of Congress' authority to require election by single-member districts? Clearly – 150 years' worth.

Congress ordered election by district in 1842, and by 1879 Congress' action was so accepted that the Court

would comment "No one will pretend, at least at the present day, that these laws were unconstitutional. . . ." *Ex Parte Siebold* (1879), *supra*, 100 U.S. at 384. The "present day" which the court spoke of was under President Rutherford B. Hayes and Chief Justice Morrison R. Waite.

Thirty-eight years later, the Court remarked that "any doubt" as to Congress' power under article I, section 4, "has been settled by repeated decisions of this court," *United States v. Gradwell, supra*, 243 at 482, citing *Ex Parte Siebold* and its progeny. The same result was reached again in 1931, *Smiley v. Holm, supra*, 285 U.S. at 366-67; and in 1940, *United States v. Classic*, 313 U.S. 299, 315 (1940); and in 1970: " . . . a long line of decisions in this Court [have held] that Congress has ultimate supervisory power over congressional elections." *Oregon v. Mitchell, supra*, 400 U.S. at 122; And again in 1975: "The constitutional power of Congress to regulate federal elections is well established. . . ." *Buckley v. Valeo*, 424 U.S. 1, 13 (1975).

Analysis of almost two hundred years' worth of debates from the Founders, the drafting evolution of article I, section 4, arguments in support and opposition to its ratification, its application by Congress, and the Court's review of Congress' actions all returns to Hamilton's simple, basic premise:

> "A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws." (*Oregon v. Mitchell, supra*, 400 U.S. at 112.

Article I, section 4, gives Congress plenary authority over the procedures to be followed in its Members, including the power to require that elections be by single-member districts.

IV.

PLAINTIFFS ARE NOT ENTITLED TO THREE JUDGE COURT

Plaintiffs in this case claim they are entitled to a three-judge court, pursuant to 28 United States Code section 2284(a). Plaintiffs are mistaken. 28 United States Code section 2284(a), provides:

> "A district court of three judges shall be convened when otherwise required by act of Congress, or when an action is filed challenging the constitutionality of the *apportionment* of *congressional districts* or the apportionment of any statewide legislative body."

As this court has already recognized, the term "reapportionment" describes the process of allocating representatives among *pre-established* districts. *California Democratic Congressional Delegation v. Eu, supra,* slip. opin., p. 1, fn. 1: The term "redistricting" refers to the process of formalizing the boundaries of the districts. *Id.*

Here, plaintiffs are not challenging the allocation of representatives among-pre-established districts, but rather, the constitutionality of pre-established districts, which has been discussed in Argument III.

Consequently, plaintiffs are not entitled to a three-judge court.

CONCLUSION

Congress' direction in 2 United States Code section 2c that Representatives be elected in single-member districts is an appropriate exercise of Congress' authority under article I, section 4, clause 1, of the Constitution prescribing the "times, places and manner of holding elections" for its own Members. Congress has exercised this authority for 150 years and the Supreme Court has recognized the validity of Congress' action for over 100 years. As the supreme law of the land, Congress' determination is binding upon defendants Governor and Secretary of State of California. U.S. Const., art. VI, § 2.

Plaintiffs pray for injunctive orders from this court barring defendants from implementing Congress' direction in the election of California's congressional delegation. However, plaintiffs' request for equitable relief is made with unclean hands. Plaintiffs sat moot through more than a year of public hearings and debate conducted by both the California Legislature and Supreme Court, soliciting comment from all interested parties in fashioning the State's redistricting plan. Plaintiffs were on notice from the inception that the California Supreme Court would follow Congress' requirement of single-member districts. Plaintiffs nevertheless waited to raise their objection until after the California Supreme Court had adopted the redistricting plan and the practical deadline had passed for defendant Secretary of State to implement the June 1992 elections. Plaintiffs can hardly argue that they were taken by surprise that district elections would be used, and their unreasonable and unjustifiable delay in bringing this action would work a severe harm to California's entire electorate.

Plaintiffs have selected the wrong venue for bringing this action. Defendants' official acts in carrying out their election duties are performed in Sacramento, in the Eastern District. Finally, plaintiffs are not entitled to a three-judge court.

For these reasons defendants respectfully request that their motion be granted under Federal Rules of Civil Procedure 12(b) and (6) and that this complaint be dismissed.

DATED: _____

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

LINDA A. CABATIC
Supervising Deputy Attorney General

ALLEN SUMNER
Assistant Attorney General

Attorneys for Defendants

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

No. 92-805

In the Supreme Court of the United States

OCTOBER TERM, 1992

TIMOTHY A. DEWITT, ET AL., APPELLANTS

v.

THOMAS S. FOLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION OF APPELLEE THOMAS S. FOLEY TO AFFIRM

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN R. DUNNE
Assistant Attorney General

DOUGLAS N. LETTER
PATRICIA A. MILLETT
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Constitution or the Voting Rights Act, 42 U.S.C. 1973 *et seq.*, prohibits the election of members of the United States House of Representatives from single-member districts, as required by 2 U.S.C. 2c.

2. Whether Article I, Section 4, of the Constitution prevents a state court from assisting in the formulation of a redistricting plan for election of the State's members in the United States House of Representatives when the State's legislative processes fail to formulate such a plan in a timely manner.

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MOTION OF APPELLEE THOMAS S. FOLEY TO AFFIRM

Pursuant to Sup. Ct. R. 18.6, Appellee Thomas S. Foley, Speaker of the United States House of Representatives, hereby moves this Court to affirm the judgment of the three-judge district court.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-37) is not reported.

JURISDICTION

The judgment of the district court was filed on August 31, 1992. A notice of appeal was filed on September 11, 1992 (J.S. App. 38-39), and the jurisdictional statement was filed on November 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. Appellants are three voters from California's seventh congressional district and one voter from Virginia. In the 1990 elections, the California appellants attempted to vote for candidates running for congressional seats other than the seventh district seat; the Virginia voter asserted a right to affiliate with voters in California by voting in congressional elections in California. Appellants filed a seventeen-count complaint in federal district court on January 29, 1992, alleging that (1) 2 U.S.C. 2c and the parallel provisions of California law that require single-member districts for congressional elections violate various clauses of the federal Constitution and the Voting Rights Act, because single-member districts unfairly deprive women and young people of proportional representation in Congress; and (2) California's redistricting plan was invalid because it was formulated by the California Supreme Court.

2. A three-judge court was convened under 28 U.S.C. 2284(a). The court granted appellees' motion to dismiss. J.S. App. 1-37. The court concluded that Congress's power under Article I, Section 4, Clause 1, to prescribe the "Times, Places and Manner of holding Elections for * * * Representatives" authorized Congress's decision to require single-member districts. The court noted that in the debates on that provision at the Constitutional Convention James Madison argued that the provision should be enacted to ensure that Congress had the power to require single-member districts. J.S. App. 11-22.

The court also rejected appellants' claim that such a rule improperly imposed a requirement for voting for representatives beyond the "Qualifications" described in Article I, Section 2, Clause 1. The court

explained that the Constitution permitted States to require "the Qualifications requisite for Electors of the most numerous branch of the State Legislature," J.S. App. 28, and concluded that because California requires voters for its Assembly to reside in the district of the seat for which they are voting, the Constitution permitted imposition of the same requirement on voters for the federal House. J.S. App. 23-30.

The court also rejected appellants' claims that single-member districts violate the First, Tenth, Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments, explaining that "[d]istrict elections are so fundamental to the political system devised by the Framers in the Constitution that none of the amendments to the Constitution should be construed to alter it by inference." J.S. App. 35.

Finally, the court rejected appellants' claim that the redistricting plan for California's congressional seats was invalid because it was formulated by the California Supreme Court. J.S. App. 35-36. The court noted the "long history of court participation in redistricting when the elected branches do not do so." *Id.* at 36.

ARGUMENT

As the district court correctly recognized, appellants' claims are meritless. Accordingly, the Court should summarily affirm the judgment of the district court without further briefing or argument.[1]

1. Appellants' principal claim is that various provisions of the Constitution, as well as the Voting Rights Act, bar Congress's enactment of 2 U.S.C. 2c,

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[1] The Court denied appellants' motion for a stay pending appeal on October 13, 1992. 113 S. Ct. 315.

which requires single-member congressional districts.[2] None of the provisions on which appellants rely supports that claim.

a. Article I, Section 4, Clause 1, of the Constitution generally provides that the "Times, Places and Manner of holding Elections for * * * Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Contrary to appellants' argument (J.S. 34-38), that Clause fully authorizes Congress's decision to require single-member districts. First, the question whether representatives should be elected in a state-wide election or in various districts lies at the heart of the "Manner" of "holding Elections for * * * Representatives." Moreover, as the district court noted, Madison justified that Clause in the debates at the Constitutional Convention by positing the need for congressional supervision of this precise question. As Madison's notes of his statement explain:

> [T]he Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. * * * It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points

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[2] Appellants also challenge the provisions of California law that require single-member districts, but because those provisions are required by 2 U.S.C. 2c, the provisions of California law must be valid if 2 U.S.C. 2c itself is valid.

> would depend on the Legislatures. and might materially affect the appointments. * * * What danger could there be in giving a controuling power to the Natl. Legislature?

2 *The Records of the Federal Convention of 1787*, at 240-241 (Max Farrand ed.) (debates of Aug. 9, 1787).

Finally, this Court's decisions repeatedly have assumed—without expressly deciding the question—that Congress properly could require its members to be elected from separate districts. See, *e.g.*, *Ex parte Siebold*, 100 U.S. 371, 384 (1880) (noting that Congress in 1842 "passed a law for the election of representatives by separate districts" and stating that "[n]o one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject [of election regulation]"); *Ex parte Yarbrough*, 110 U.S. 651, 660 (1884) (describing Congress's decision to mandate single-member districts as taken under "the powers * * * conferred" by Article I, Section 4); *Wesberry* v. *Sanders*, 376 U.S. 1, 16 (1964) (suggesting that the Clause would have permitted Congress to "lay the state off into districts"); *Oregon* v. *Mitchell*, 400 U.S. 112, 121-122 (1970) (opinion of Black, J.) (noting that "the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts").

Appellants cite no support for the counterintuitive suggestion that the Times, Places and Manner Clause does not authorize Congress to regulate this aspect of the "Manner" of electing representatives. In light of the authorities discussed above, the claim does not merit plenary review by this Court.

b. Appellants also argue (J.S. 15-34) that even if the Times, Places and Manner Clause authorizes Congress to require single-member districts, such a requirement violates Article I, Section 2, Clause 1, by imposing a "Qualificatio[n]" that is not "requisite for Electors of the most numerous Branch of the State Legislature." That claim is meritless, because the requirement that voters vote in the district in which they reside does not impose any additional qualification an individual must meet to be eligible to vote; the same individuals would be eligible to vote even if members were elected at large. All that the single-member district requirement does is specify the manner in which individuals will be able to vote: they will be able to vote only in the district in which they reside. Again, appellants cite no authority suggesting that the Qualifications Clause prevents Congress from delineating the manner in which persons who can vote in the State elections will be able to cast their vote for a representative in Congress.[3]

c. Appellants also argue (J.S. 38-42) that the requirement of single-member districting deprives the States of a republican form of government in viola-

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[3] Appellants' reliance (J.S. 24-26) on *Powell* v. *McCormack*, 395 U.S. 486 (1969), is misplaced. In that case, the Court approved of an 1807 decision of the House of Representatives rejecting a Maryland rule that required a Congressman to be a resident of a particular portion of the State. As the lower court explained, the Maryland rule in question was invalid because it exceeded the constitutional qualification that a representative "be an Inhabitant of that State in which he shall be chosen." Article I, Section 2, Clause 2; see J.S. App. 27-28. Because Clause 1 of that Section—the provision at issue here—does not state that all voters in the State must be eligible to vote for all representatives from the State, the decision in *Powell* does not support appellants in this case.

tion of the Guaranty Clause, Article IV, Section 4. They fail to address this Court's decisions holding that the Guaranty Clause does not afford a judicially enforceable right to private individuals. See, *e.g.*, *Pacific States Telephone and Telegraph Company* v. *Oregon*, 223 U.S. 118, 140-151 (1912); see also *New York* v. *United States*, 112 S. Ct. 2408, 2433 (1992) ("indulging the assumption" that "the Guarantee Clause provides a basis upon which a *State or its subdivisions* may sue to enjoin the enforcement of a federal statute" (emphasis added)). Accordingly, their reliance on the Guaranty Clause does not provide a basis for overturning 2 U.S.C. 2c.

d. Appellants also contend (J.S. 8-15) that Congress's decision to require single-member districts violates the Tenth Amendment because it infringes on aspects of state sovereignty that the States retained when the Constitution was enacted. In light of the plain terms of the Times, Places and Manner Clause discussed above, and Madison's express statement that Congress needed the power to control such determinations, it is clear that the plan of the Convention included a transfer of that authority to the national government, which was reflected in the text of the Constitution as enacted. Appellants cite no judicial decision accepting such a limited view of congressional power in this area. The question does not merit plenary review in this Court.

e. Appellants also suggest (J.S. 46-56) that single-member districts deprive them of an equal vote and thus violate the one-person, one-vote guarantee of the Fifteenth Amendment or the Equal Protection Clause. But those provisions do not require exact equality, only "a good-faith effort to achieve precise mathematical equality," *United States Department*

of Commerce v. *Montana*, 112 S. Ct. 1415, 1426 (1992). In light of the substantial obstacles to equal representation that can arise from at-large electoral systems, see, *e.g.*, *Whitcomb* v. *Chavis*, 403 U.S. 124, 141-144 (1971), and the "measure of discretion" accorded to congressional legislation in the area, see *Montana*, 112 S. Ct. at 1429, Congress's decision to require single-member districts is entirely permissible.

f. Appellants also argue (J.S. 59-65) that 2 U.S.C. 2c violates the First Amendment by preventing them from voting in elections for representatives outside their district. That claim is meritless. Although the First Amendment does impose substantial restrictions on governmental efforts to restrict campaigning or political association, see, *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), it does not grant a right to vote in an election limited to a district in which the claimant does not reside. Appellants cite no decision of any court suggesting that the First Amendment grants any such right. The decision of the district court rejecting that claim does not merit plenary review in this Court.

g. Appellants also argue (J.S. 56-59) that the requirement of single-member districts violates the Voting Rights Act, 42 U.S.C. 1973 *et seq.* But Section 2 of the Voting Rights Act regulates only the practices of States and political subdivisions, see 42 U.S.C. 1973(a); it does not regulate Acts of Congress. Accordingly, 2 U.S.C. 2c does not violate the Voting Rights Act, and provisions of California law consistent with the federal statute cannot violate the Voting Rights Act to the extent they are required by federal law.[4]

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[4] Moreover, the Voting Rights Act prevents discrimination only if it is "on account of race or color [or membership in a

2. Finally, appellants argue (J.S. 3-8) that California's redistricting plan is unconstitutional because it was prepared by the California Supreme Court, rather than the state legislature; appellants claim that this violates the requirement set forth in Article I, Section 4, Clause 1, that the "Times, Places and Manner of holding Elections * * * shall be prescribed in each State by the Legislature." But appellants ignore the fact that the California Supreme Court assumed responsibility for drafting a redistricting plan only when the legislative process deadlocked. See *Members of California Democratic Congressional Delegation* v. *Eu*, 790 F. Supp. 925, 927 (N.D. Cal. 1992) (three-judge court). As this Court has recognized, participation by the state courts in such circumstances is entirely appropriate. See, *e.g.*, *Scott* v. *Germano*, 381 U.S. 407, 409 (1965) (per curiam) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").[5]

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language minority group]," 42 U.S.C. 1973(a). Because appellants' complaint seeks to remedy discrimination against females and young people, it does not state a claim for relief under the Act.

[5] Appellants' reliance (J.S. 4-6) on *Smiley* v. *Holm*, 285 U.S. 355 (1932), is misplaced. In that case the Court held that it was permissible for a state governor to participate in the process (by vetoing the plan adopted by the legislature), based on the theory that he was part of the law-making process established by the State. The Court explained that it "is a matter of state policy" whether a particular entity "shall have a part in the making of state laws" required to regulate elections under Article I, Section 4. 285 U.S. at 368. That rationale supports the result here, because the California Supreme

CONCLUSION

The decision of the three-judge district court should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN R. DUNNE
Assistant Attorney General

DOUGLAS N. LETTER
PATRICIA A. MILLETT
Attorneys

JANUARY 1993

Court, like its Governor, forms a part of the entire law-making process of the State, even though it is not part of the legislative branch.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60137

Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

No. 92-805

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TIMOTHY A. DeWITT, ET AL.,
APPELLANTS

v.

THOMAS S. FOLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OPPOSING APPELLEES' MOTIONS TO AFFIRM

ARLO HALE SMITH
251 Kearny St., Ste. 602
San Francisco, Calif. 94108
(415) 788-5297
Counsel of Record

TIMOTHY A. DeWITT
6603 Kensington Ave.
Richmond, Calif. 94805
(510) 237-7240

QUESTIONS PRESENTED

In this case officers of the state and federal governments attempt to compel the sovereign people of California to select their federal congressional delegation through a racially segregative districting plan formulated by unelected members of the California Supreme Court. The questions presented by this case are:

1. Whether the federal government has power substantively to apportion federal Representatives within, as opposed to among, the sovereign States.

2. Whether the California Supreme Court is "the Legislature" of California within the meaning of the Elections Clause of the U.S. Constitution (art. I, sec. 4).

3. Whether the Fourteenth Amendment's prohibition against "separate but equal" laws which has been applied, among other things, to public schools, beaches, and golf courses, also applies to congressional election districts.

4. Whether requiring federal voters to vote in district contests in which as many as six to seven times (600% to 700%) as many voters vote in some suburban and rural districts compared to other, urban districts violates the constitutional requirement of "one person, one vote."

5. Whether congressional voters and candidates qualified directly in and by the federal Constitution (Art. I, sec. 2, cls. 1 & 2) may be permitted, or required, by federal law (2 U.S.C. 2c) simultaneously to participate in contests

selecting fully 100% of the congressional delegations in, for example, the small States of Alaska and Wyoming, but less than 2% of the delegation for the sovereign, large State of California.

6. Whether federal Congress may mandate that State legislatures and the sovereign people of the States (or state and federal courts) affirmatively draw or establish congressional districts.

7. Whether Framers considered intra-state territorial residency restrictions to be "fundamental" to the American political system, and even assuming they did, whether their failure to express or incorporate this belief in the new, written Constitution demonstrates that they intended such restrictions to be subject to ordinary Constitutional review.

8. Whether minority voting groups of all types (e.g., racial minority groups, or the minority Republican political party) must have the opportunity to elect Members of the U.S. House of Representatives in numbers proportionate to their actual voting strength in the sovereign States.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-37), is not yet reported.

JURISDICTION

The judgment of the three-judge

district court was filed on August 31, 1992. The notice of direct appeal (J.S. App. 38-39) was filed on September 11, 1992. The appellate jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

The Plaintiff-Appellants in this case are qualified and registered federal voters from California and Virginia, respectively, who desire to vote in congressional contests in their States outside the one single-member district in which they reside.

Appellants desire to associate in their State's congressional elections with like-minded voters and candidates to promote common ideas and interests, and to elect candidates of their choice to Congress.[1]

---

[1] Please note again that, contrary to the district court's (and now the Appellees') apparent assumption, the Virginia Appellant here,

ARGUMENT

A. APPELLEES FAIL EVEN TO ADDRESS SEVERAL LEAD CONSTITUTIONAL QUESTIONS RAISED BY THIS CASE

1. Appellees Fail to Address Leading *Brown v. Board of Education*, Anti-Segregation Claim.

As Justice Mosk noted in dissent in Wilson v. Eu, 1 Cal.4th 707, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (1992), the special masters appointed to formulate the State's new districting plan admitted in their final report that one of their primary objectives was to separate members of California's federal electorate on the basis of race and ethnicity. 1 Cal.4th, at 733.

Justice Mosk even went so far as to suggest that the proposed plan imposed impermissible racial and ethnic "quotas."

Rene A. Rivas, has no interest in voting in California's congressional elections.

Id. (citing Bakke v. Regents of University of California, 18 Cal.3d 34 (1976); University of California Regents v. Bakke, 438 U.S. 265 (1978)).

Appellants here, however, allege simply that allocating voters among mutually exclusive election districts on the basis of race and ethnicity violates the Fourteenth (and presumably Fifteenth) Amendment's proscription against racially segregative, or "separate but equal," laws. See Brown v. Board of Education, 347 U.S. 483 (1954).

The district court, for its part, erred badly in dismissing this claim in the first place. The court below concluded, in essence, that the special masters' subjective desire to comply with the federal Voting Rights Act, 42 U.S.C. 1973(a) & (b), as construed by this Court

in Thornburg v. Gingles, 478 U.S. 30 (1986), was sufficient in itself to justify Constitutional injuries resulting from the intentional physical separation of voters and candidates on the basis of race or ethnicity. See J.S. App., at 32-35. The district court's holding here simply must be wrong, however.

Congress enacted the Voting Rights Act under authority of the Enabling Clauses of the Fourteenth and Fifteenth Amendments. While the Enabling Clauses do confer broad enforcement powers on Congress, it should nonetheless be plain that Congress is not authorized by these clauses affirmatively to violate the substantive clauses of those same amendments. The district court's idea below that the special masters' new purposefully racially segregative plan

for California is somehow justified by virtue of this Court's construction of the federal Voting Rights Act in Gingles is therefore simply palpably erroneous.

The district court's summary dismissal of Appellants' anti-segregation claim in this case must be reversed.

2. Appellees' Failure to Address Appellants' Candidate Qualifications and Apportionment Clause Claims Fatally Undermines Analysis Proposed for Voter Qualifications Claim.

Appellees also fail even to address Appellants' claims based on the Candidate Qualifications and Apportionment Clauses, respectively, of the U.S. Constitution. Art. I, § 2, cls. 2 & 3.

Like its attempt to impose the direct federal income tax struck down in Pollock v. Farmers' Loan & Trust Co., 157

U.S. 429 (1895), Congress' effort here to apportion or allocate federal Representatives within, as opposed to among, the sovereign States violates the plain terms of the Apportionment Clause of the U.S. Constitution. Art. I, § 2, cl. 3.

Small-state members in the U.S. Senate join with self-interested, incumbent members of the U.S. House of Representatives to promote their respective, but equally illegitimate, goals. Small-state Senators seek to impose a disproportionate burden on the electorates of large states in promoting and protecting their interests in the House of Representatives. See, e.g., Remarks of Sen. Crittenden of Kentucky, Cong. Globe, 27th Cong., 2d Sess., at 457-58 (App. 1842). House incumbents,

for their part, seek simply to avoid difficult re-election contests against fellow incumbent members of their respective State congressional delegations. See J.S., at 61-62.

These self-interested federal legislators achieve the desired illegitimate "apportionment" of federal Representatives within, as opposed to among, the States, however, precisely by imposing independently illegitimate district-based, sub- or intra-state territorial residency qualifications on all congressional candidates. These restrictions in turn violate -- as Appellants also specifically allege in this action -- the plain terms of the Candidate Qualifications Clause.[2]

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[2] And the fundamental principle that qualifications of federal voters and candidates are "defined and fixed" in the Constitution and

Ignoring each of the above claims in their entirety, however, the State and federal Appellees now argue that Appellants' separate Voter Qualifications claim can be defeated simply by treating identical sub-state voter residency restrictions as harmless "Times, Places, and Manner" regulations authorized by the separate Elections Clause of the U.S. Constitution. Art. I, § 4.

In view of their continuing failure even to address Appellants' independent Apportionment and Candidate Qualifications claims, however, Appellees' more limited argument regarding the proper treatment of district residency restrictions under the

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"unalterable" by Congress was re-affirmed by this Court as recently as three weeks ago. Nixon v. United States, 93 DAR 574, 577 (January 13, 1993) (citing Powell v. McCormack, 395 U.S. 486, 539 (1969)).

separate Voter Qualifications and Elections Clauses, simply lacks any persuasiveness.

In sum, Appellees' failure to address Appellants' Candidate Qualifications and Apportionment Clause claims in this case simply fatally undermines what limited analysis they eventually do offer for the Voter Qualifications claim. Accordingly, the district court's dismissal of these claims must be reversed.

3. Arithmetical Deviations in Actual Votes Cast From District to District of Approximately 600% to 700% Infringe Severely Upon All Californians' Rights to Actual Electoral Equality, or 'One Person, One Vote'; Issue Fails to Provoke Even One Comment from Appellees Here, However.

In addition to the several omissions already discussed, the Appellees also fail even to mention

Appellants' equally paramount electoral equality claim.

Appellants allege in this case that requiring California's federal electorate to select its representative congressional delegation through a districting plan producing deviations in actual votes cast from district to district as high as 600% to 700% violates the fundamental principle of "one person, one vote."

In Wesberry v. Sanders, 376 U.S. 1 (1964), this Court held, per Black, J., that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Id. at 8.

With deviations in actual votes cast

from district to district as high as 600 to 700%, however, some federal voters in California enjoy as much as six to seven times as much influence as other, identically qualified, voters in selecting California's congressional delegation. Aside from the question of whether California's new districts contain reasonably equal numbers of people, then, that they contain such vastly disparate numbers of actual federal voters simply cannot be consistent with this Court's ongoing commitment to the fundamental constitutional principle of "one person, one vote."[3]

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[3] Again, compare Judge Kozinski's opinion, concurring in part and dissenting in part, in Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir.1990) (concluding that one-person, one-vote principle requires more than simple population equality even in state and local elections), cert. denied, 111 S. Ct. 681 (1991).

The district court plainly erred in summarily dismissing Appellants' electoral equality -- or "one person, one vote" -- claim in this case, and its judgment must therefore be reversed.

B. WHAT ANALYSIS IS OFFERED BY THE APPELLEES FOR THE REMAINING CLAIMS AND ISSUES SIMPLY LACKS MERIT

1. Appellees' Continued Reliance on the *Ex Parte Seibold* (1880) Case is Entirely Misplaced in View of this Court's Holding in *New York v. United States* (1992) Last Term, and Particularly in Light of the House of Representatives' Own *Repeated Admissions*, from 1844 to 1910, that Federal Districting Mandates (see 5 Stat. 491 (1842)) are Indeed Unconstitutional.

In January 1844, the Committee on Elections of the U.S. House of Representatives, per Stephen A. Douglas (D-Ill.), Chair, concluded forcefully that:

> Congress has no more authority to direct the form of State legislation, than the States have to

> dictate to Congress its rule of action.
>
> The right to change State laws, or to enact others which shall suspend them, does not imply the right to compel the State Legislatures to make such changes or new enactments.[4]

And, just last term, this Court strongly re-affirmed that:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government.
>
> As an initial matter, Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. [citation omitted]

New York v. United States, 112 S. Ct. 2408, 2423 & 2434 (1992).

In accordance with these plain

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[4] Relative to the Right of Members to Their Seats in the House of Representatives, H.R. Rep. No. 60, 28th Cong., 1st Sess., p. 6 (Jan. 22, 1844)

principles, Plaintiff-Appellants claim that Congress' attempt to require that congressional elections take place only through single-member districts contains the lesser-included mandate or instruction to the sovereign States that they take the affirmative political or legislative act of drawing or establishing such districts. Appellees, for their part, now rely on the case of Ex parte Seibold, 100 U.S. 371 (1880) (approving early federal civil rights laws), to oppose this straightforward claim.

The Seibold case simply has no bearing on the question presented here, however. Appellants are not alleging that 2 U.S.C. 2c is unconstitutional because it is a "partial" regulation of federal elections. They claim simply

that the federal government may not order or instruct the States to draw or establish federal election districts.[5]

State Appellees argue in this case that "Congress has exercised its power to require district election for 150 years without challenge." S.M.A., at 11 (emphasis supplied). As should already be apparent, however, this statement is itself patently false. Again, in 1844 Congress itself admitted -- in the face of direct challenge from four statewide delegations (representing New Hampshire, Georgia, Mississippi, and Missouri,

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[5] That the Seibold case has no bearing on this question is made even more plain by Congress' own actions, 20 to 30 years after that case was decided, again simply refusing to enforce its federal districting statute. See Davison v. Gilbert, H.R. Rep. No. 3000, 56th Cong., 2d Sess. (1901); Parsons v. Saunders, H.R. Rep. No. 1695, 61st Cong., 2d Sess. (1910) (Committee minority's opinion followed by full House of Representatives; Committee majority's recommendations rejected).

respectively) -- that its federal districting mandate was indeed unconstitutional.[6]

In sum, Appellees' argument in this case that the federal Congress somehow has power to order or instruct the States in their sovereign or corporate capacities to draw or establish congressional election districts is, again, simply palpably meritless. Accordingly, the district court's erroneous dismissal of Appellants' core federalism claim in this case must be

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[6] Again, see Relative to the Right of Members to Their Seats in the House of Representatives, H.R. Rep. No. 60, 28th Cong., 1st Sess. (1844).

Stating the historical record more accurately, then, until its hastily arranged return (by way of private immigration bill) in 1967 (see 81 Stat. 581), Congress' single-member districting mandate had been successfully challenged on several separate occasions, and had never once been enforced by Congress, or any court of law.

reversed.

2. Framers Did Not Intend the Words 'the Legislature' in the Elections Clause of the U.S. Constitution to Include Unelected State Judicial Bodies.

The Federal Appellee argues that the California Supreme Court is properly understood to be part of "the Legislature" of California within the meaning of the Elections Clause of the U.S. Constitution. Art. I, § 4. He relies for support of this view on the Court's reasoning in the case of Smiley v. Holm, 285 U.S. 355 (1932), to the effect that those institutions which are part of the ordinary "law-making" process of a State may be considered part of "the Legislature thereof" in the Elections Clause, and claims that state courts are part of this general "law-making" process. F.M.A., at 9-10 & n. 5.

Such an expansive reading of the Smiley decision, however, overlooks what must have been the Framers' original rationale for specifying that "the Legislature[s]" of the States should govern the procedures of congressional elections in the first place.

When Charles Pinckney first proposed in the Constitutional convention that federal Representatives be elected "in such manner as the Legislatures of each State should direct" he reasoned in support of the proposal that "the Legislature could then accommodate the mode to the convenience and opinions of the people." Quoted in Relative to the Right, supra, at p. 4 (emphasis supplied). But if unelected courts are permitted to intervene in the ordinary legislative or political processes of a

State and themselves draw or establish congressional districts, it is precisely the "convenience and opinion of the people" of the States which is eliminated from the process altogether.

Districting plans developed by unelected courts are entirely divorced from the popular will, or "convenience and opinion," of the people. There is literally no way of knowing whether a majority of the people at large actually support a particular court-drawn districting plan, or, more fundamentally -- when the judiciary intervenes after the legislature has "deadlocked," (F.M.A., at 9) -- whether the people desire to establish new districts at all.

In sum, the Framers did not intend the words "the Legislature" in the Elections Clause of the U.S. Constitution

to include unelected state courts. Accordingly, the district court's summary dismissal of Appellants' claim that the California Supreme Court lacks authority to draw or establish federal election districts must also be reversed.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

ARLO HALE SMITH
(Counsel of Record)

TIMOTHY A. DeWITT
Attorneys for Appellants

January 1993